

Soil Engineering & Exploration Co., Inc. and International Union of Operating Engineers, Local 150, AFL-CIO. Case 13-CA-21966

8 March 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER**

On 28 February 1983 Administrative Law Judge Nancy M. Sherman issued the attached Decision. The General Counsel and the Respondent filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,¹ findings, and conclusions² only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified.

The judge concluded that the Respondent violated Section 8(a)(1) of the Act by coercively interrogating employee Joseph Petrarca and by threatening him with plant closure, and thereafter violated Section 8(a)(3) of the Act by discharging Petrarca for union activity. Although she found that the Respondent had engaged in identical conduct with respect to employee Barry Urban, the judge dismissed these complaint allegations on the ground that Urban and the Respondent's other full-time driller, Craig Evankoe, are supervisors under the Act. Based on the unfair labor practices that the Respondent committed, the judge also determined that a bargaining order was appropriate under standards set out in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). While we affirm the violations the judge found and her recommendation that a bargaining order should issue here, we further conclude that the drillers are not statutory supervisors. Accordingly, we find 8(a)(1) violations in the coercive interrogation and threat of plant closure involving Urban and, employing the test set forth in *Wright Line*, 251 NLRB 1083 (1980), 8(a)(3) violations in Urban's discharge as well as Petrarca's.

The burden of disproving the drillers' employee status rested on the Respondent as the party assert-

ing that they are supervisors.³ With respect to this issue, the record evidence discloses that the Respondent conducts drilling operations on prospective building sites to obtain soil samples which it thereafter analyzes for its customers. A driller and his helper generally work as a team in performing the onsite drilling function. Whereas helpers are basically unskilled manual laborers, drillers must possess certain mechanical skills to operate the mobile drilling rigs that the Respondent utilizes. The Respondent's president, Collin Gray, and its drilling supervisor, Rash Mamtora, direct these operations.

During the hearing, Gray testified that the drillers are in charge of their rigs and that they have the authority to discharge or to effectively recommend the discharge of their helpers. Gray cited several examples, although none occurred since 1979, where he had fired helpers based on recommendations that drillers made. Furthermore, the Respondent's drillers, Evankoe and Urban, both testified that Gray had instructed them that, if their helpers' work was inadequate, they should tell him or Mamtora, and the Respondent would terminate the helper. Evankoe also stated that when he was hired, and on several later occasions, Gray said that he could fire on the spot any helper who was not worth his time. Relying on the testimony by Evankoe and Urban, the judge found that the drillers are supervisors because they can discharge or effectively recommend the discharge of their helpers.

Contrary to the judge, we find the evidence insufficient to establish that the drillers possessed any of the statutory indicia of supervisory authority. It is undisputed that Evankoe and Urban did not discipline their helpers or recommend such action during their tenure of employment with the Respondent. While it is true that Evankoe was told he could fire his helper on the spot, there is no evidence that any driller ever had taken such action and, indeed, the record is clear that Evankoe consulted Gray on those few occasions when he was dissatisfied with his helper's work.⁴ More critically, Gray testified that he has "a standing policy with [his] drillers if their helper is no good he's supposed to tell Mr. Mamtora that he doesn't want them working with him and the helper would be dismissed." For these reasons, we do not conclude that Gray's isolated remarks to Evankoe conferred supervisory status on these employees.⁵ Nor do we find that the Respondent's "standing policy," as stated by Gray, establishes that drillers can effec-

¹ The judge's order correcting the record in this case issued on 22 February 1982. Her subsequent order correcting transcript issued on 7 January 1983.

² In the absence of exceptions thereto, we adopt, pro forma, the judge's finding that the Respondent has not, as alleged, violated Sec. 8(a)(5) and (1) of the Act by rejecting the Union's bargaining demand.

While he adopts the judge's finding that the Respondent's operations satisfy the Board's jurisdictional standards, Member Hunter finds it unnecessary to rely on her reference to *Radio Free Europe*, 262 NLRB 549 (1982).

³ *Tucson Gas & Electric Co.*, 241 NLRB 181 (1979).

⁴ That helper, Kevin McArthur, never was disciplined.

⁵ See *Lloyd Ornamental & Steel Fabricators*, 197 NLRB 367, 372 (1972).

tively recommend the discharge of their helpers. As the Board stated in *Southern Bleachery & Print Works*, 115 NLRB 787, 791 (1956), in discussing the authority of machine printers over their assistants:

We have no doubt that almost any employer, when told by a skilled craftsman that his helper is incompetent and that he needs a new helper if he is properly to perform his functions, would accept the judgment of the craftsman. While this may be called effective recommendation, it is inherent in the craftsman-helper relationship. . . .

Thus, although Gray had informed both drillers that he would take disciplinary action if they complained about a helper's work and that Gray, in fact, had done so in a few instances over the years, we find that only Gray and Mamtora effectively possessed the power to discharge a helper for poor performance. And the authority that the drillers exercised in directing their helpers' work is no different, in our view, from that any skilled workers has over helpers and apprentices.⁶ In so holding, we note that, were we to find the drillers to be supervisors, the result would be a highly disproportionate ratio of one supervisor for each employee. Such a ratio is unrealistic,⁷ and incompatible with a finding that the drillers are supervisors.

For the above reasons, we conclude that the Respondent has not met its burden of establishing that Evankoe and Urban are supervisors as defined by the Act. Accordingly, we find that the Respondent violated Section 8(a)(1) of the Act by coercively interrogating Urban about union activities and by threatening him with plant closure.

As for the discharges of Urban and Petrarca, the record discloses that the Respondent rehired Urban 5 July 1981.⁸ Gray warned Urban then, while referring to the employee's previous tenure of employment,⁹ that he would be discharged if his work did not improve. Following his reemployment, Urban performed satisfactorily as a helper to driller Evankoe. Thereafter, the Respondent assigned him to assist Jim Fogleman, an experienced driller, on a job in Milwaukee, Wisconsin. On 21 November Gray threatened to discharge both employees for their lack of production.¹⁰

⁶ For these reasons, we disagree with the judge's finding that *Ward-McCarty Hot Oil-Paraffin Service*, 171 NLRB 731, 732-734 (1968), is inapposite here.

⁷ See *Airkaman, Inc.*, 230 NLRB 924, 926 (1977), where the Board found a ratio of one supervisor to three employees excessively high.

⁸ All dates hereinafter are in late 1981 or early 1982.

⁹ On 4 January 1980 Gray discharged Urban for poor performance and because he damaged a company vehicle.

¹⁰ Fogleman subsequently quit or was discharged in mid-December.

About early December, Urban began working as a driller on a new project that encompassed 18 separate sites in the Milwaukee area. Gray instructed Urban that he wanted one site completed each day. While Larry Pappageorge initially served as Urban's helper on this project, Petrarca performed this function after the Respondent rehired him in late December. On at least five occasions between 8 December and Urban's 28 January discharge, Gray admonished Urban that the drilling there "had to be done and done on time." Gray also repeatedly told Urban and Petrarca in January, "Let's get with it, you with me, let's get on the ball."

Union activity began in January when the Respondent's drillers, helpers, and its shop mechanic, Bill Leary, signed authorization cards. On 25 January Gray received a telegram informing him that the Union represented a majority of the employees. Gray immediately interrogated Leary and threatened him with plant closure.¹¹ When Urban phoned in from a jobsite later that day, Gray engaged in similar conduct, which we have found violated Section 8(a)(1) of the Act. Thereafter, upon the return of Urban and Petrarca to the Respondent's facility, Gray interrogated them and Leary about the union activities and again threatened plant closure. The three employees admitted to Gray during this meeting that they had signed union cards. When Gray asked how they would vote in an election, the employees said that they would go along with whatever the majority decided.

Subsequently, on 28 January Urban and Petrarca went to a jobsite to drill soil borings in a snow-covered field. They left the Respondent's facility an hour late because they had waited futilely for a laboratory technician who was supposed to accompany them. Upon arriving at the jobsite, Urban drove the drilling rig through the field to locate the drilling site. Petrarca walked in front of the vehicle searching for ditches or obstructions hidden by the snow. Despite their efforts, the rear end of Urban's rig fell into an ice-covered ditch. After considerable delay, the rig was pulled out of the ditch by a farmer's tractor. Since by this time it was early afternoon and he was feeling sick, Urban decided that they would return to the Respondent's facility. The employees did not inform the Respondent of the situation, however, until their pickup truck incurred a flat tire while they were en route to the shop. When they finally reached the Respondent's facility, Gray discharged them "for

¹¹ Since we agree with the judge's finding that Leary is a supervisor as defined in the Act, we do not find that this conduct was unlawful.

lack of work." Gray also told them that they were not worth "union wages."

We conclude that the General Counsel has made a prima facie showing that the union activities of Urban and Petrarca were the motivating factor in the Respondent's decision to discharge them. In this case, the Respondent's animus toward the Union clearly is demonstrated by its repeated threats to cease drilling operations in the event of unionization. The Respondent thereafter discharged Urban and Petrarca only 3 days after being informed that they were engaged in union activity. We also note that Gray made a reference to the Union while informing the employees of his decision to terminate them. Under these circumstances, we find that the evidence submitted by the General Counsel effectively shifted the burden to the Respondent to show that the discharges would have occurred even in the absence of the employees' union activities.

The Respondent contends that Urban and Petrarca were discharged for poor performance and because a company truck they were driving had been damaged the previous week. We reject its argument about the employees' alleged lack of production since it is clear from the record that the Respondent tolerated any deficiencies in their performance until learning of the union activity. Furthermore, as the judge found, Urban's drilling work was comparable to that performed by Evan-koe, an excellent driller, whose standard Gray admittedly did not expect the Urban-Petrarca team to meet. As for the Respondent's contention that it discharged the employees for the incident involving its vehicle, we note that the record is devoid of evidence that the Respondent ever approached Urban and Petrarca about this matter, which occurred before the union activity commenced. Finally, not only does the factor of timing undermine the Respondent's defense, but the Respondent also gave shifting reasons for the discharges. Urban and Petrarca initially were told, as noted, that they were being discharged "for lack of work." Thereafter, during a district court proceeding under Section 10(j) of the Act and before the judge in this case, the Respondent argued that it discharged the employees for the reasons stated above. Accordingly, we conclude that the Respondent has not met its burden of showing that the same action would have occurred in the absence of its employees' union activities, and therefore find that Urban's and Petrarca's discharges violated Section 8(a)(3) of the Act.

As noted above, we agree with the judge's conclusion that a bargaining order is an appropriate remedy in this proceeding. It also is clear that the

8(a)(1) and (3) violations found in the Respondent's conduct involving Urban provide additional support for the Judge's finding that the Respondent's violations significantly have reduced the possibility that the imposition of the conventional reinstatement and backpay orders and the posting of notices to remedy the unfair labor practices would permit a fair election within a reasonable period of time.¹² Finally, since we have concluded that the drillers employed by the Respondent are not supervisors as defined by the Act, we shall modify the unit description accordingly.

CONCLUSIONS OF LAW

1. The Respondent, Soil Engineering & Exploration Co., Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Operating Engineers, Local 150, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All drillers and helpers employed at the Respondent's Tinley Park, Illinois, facility; excluding office employees, laboratory employees, the shop mechanic, and other supervisors and guards as defined by the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times since 25 January 1982 the Union has been and now is the exclusive collective-bargaining representative of the employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment.

5. By coercively interrogating employees Barry Urban and Joseph Petrarca and by threatening them with plant closure, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. By discharging employees Urban and Petrarca for their union activities, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

7. The Respondent has not otherwise violated the Act.

¹² Contrary to our colleagues, we find that the severity of the unfair labor practices the Respondent committed and particularly the evidence that it unlawfully discharged one-third of the bargaining unit, i.e., two of six employees, warrants the imposition of a bargaining order in this small unit.

In reaching this conclusion, however, we place no reliance on the judge's comments in the paragraph immediately preceding her "Conclusions of Law" where she speculates as to the impact of the Respondent's unlawful conduct on the bargaining unit in the event that discriminatee Joseph Petrarca declines reinstatement.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Soil Engineering & Exploration Co., Inc., Tinley Park, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Offer Barry Urban and Joseph Petrarca immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision."

2. Substitute the following for paragraph 2(b).

"(b) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way."

3. Substitute the following for paragraph 2(d).

"(d) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

"All drillers and helpers employed at the Employer's Tinley Park, Illinois, facility; excluding office employees, laboratory employees, the shop mechanic, and other supervisors and guards as defined by the Act."

4. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges unfair labor practices not found herein.

CHAIRMAN DOTSON, dissenting.

I agree with the judge that Urban was a supervisor and therefore the discharge of Urban did not violate Section 8(a)(3) of the Act. The judge credited the testimony of the two drillers and found that Urban was a supervisor because he had the power to (1) discharge or (2) effectively to recommend the discharge or transfer of his helper. The majority, in reversing the judge, only discusses the judge's second finding and concludes that the driller's authority is no different from that of any

skilled worker's authority over a helper or apprentice. However, the draft does not discuss the judge's finding that the drillers had the power to discharge, crediting the testimony that a driller was told that "if the driller felt that the helper was not worth his time, the driller was to fire him on the spot." (Citing ALJ, sec. II,D,3,c, par. 5.)

I would not order a *Gissel* bargaining order in this case. Although the unit is small, I do not see nor understand the majority's view that the Board's traditional remedies would not suffice in this case. It seems to me that reinstatement of discharged workers is sufficient remedy and would provide for a free choice in an election environment.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten to shut down our business if you choose union representation, or interrogate you about union activity in a manner constituting interference, restraint, and coercion.

WE WILL NOT discharge you, or otherwise discriminate against you, with regard to your hire or tenure of employment or any term or condition of employment, to discourage membership in International Union of Operating Engineers, Local 150, AFL-CIO, or any other union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Barry Urban and Joseph Petrarca immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from

their discharge, less any net interim earnings, plus interest.

WE WILL expunge from our files any references to Urban's and Petrarca's discharges, and notify them in writing that this has been done and that evidence of their unlawful discharges will not be used as a basis for future personnel action against them.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All drillers and helpers employed at the Employer's Tinley Park, Illinois, facility; excluding office employees, laboratory employees, the shop mechanic, and other supervisors and guards as defined by the Act.

SOIL ENGINEERING & EXPLORATION
Co., Inc.

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. This case was heard before me in Chicago, Illinois, on July 12-14, 1982, pursuant to a charge filed on February 3, 1982, and amended on February 10, 1982, and a complaint issued on March 12, 1982, and amended on July 12, 1982. The complaint alleges that Respondent Soil Engineering & Exploration Co., Inc. violated Section 8(a)(1) of the National Labor Relations Act (the Act) by interrogating and threatening employees regarding union activity; and violated Section 8(a)(3) and (1) of the Act by discharging Barry Urban, Joseph Petrarca, and Larry Pappageorge to discourage membership in International Union of Operating Engineers, Local 150, AFL-CIO (the Union). The complaint further alleges that Respondent's refusal to bargain with the Union, which had allegedly obtained majority status in an allegedly appropriate unit, violated Section 8(a)(5) and (1) of the Act, and warrants the issuance of a bargaining order, in view of Respondent's other alleged unfair labor practices.

On May 11, 1982, the Regional Director for Region 13 filed with the United States District Court, Northern District of Illinois, Eastern Division, a petition under Section 10(j) of the Act for a preliminary injunction requiring Respondent to reinstate Urban and Petrarca and to bargain with the Union. At the conclusion of the hearing on the petition (held on May 28, 1982), it was denied by United States District Court Judge George N. Leighton. Judge Leighton found, inter alia, that Respondent's president, Collin W. Gray, asked his employees whether they had signed any papers indicating their desire to become unionized, and told them that he would sell his plant and close his business if they became union members. However, Judge Leighton stated during the hearing that an employer can lawfully express his opinion about unions; and can close his plant if he wants to, as long as he does not do it to interfere with the employees' statu-

tory rights. Judge Leighton further found that Urban and Petrarca had been discharged because they were not useful and effective employees; that Larry Pappageorge had been discharged for damaging company property; and that none of these three individuals had been discharged for union activities. On September 21, 1982, Judge Leighton granted the Regional Director's motion for reconsideration, but adhered to the original ruling denying the petition. *Crawford v. Soil Engineering & Exploration Co.*, Case No. 82-C-2932. The district court's decision does not control the result in the instant case. *Wometco Coca-Cola Bottling Co. of Nashville*, 255 NLRB 431, 447 fn. 61 (1981). The record made before the district court was received into evidence before me. The parties to the instant proceeding stipulated that the witnesses in the district court proceeding, if called before me, would testify substantially the same, but that this stipulation would not preclude anyone from recalling such witnesses.

Upon the entire record,¹ including the demeanor of the witnesses when they testified before me, and after due consideration of the briefs filed by Respondent and by counsel for the General Counsel (the General Counsel), I issue the following

FINDINGS OF FACT

1. JURISDICTION

Respondent is an Illinois corporation with its office and place of business located in Tinley Park, Illinois. Respondent is engaged in the business of providing geotechnical engineering services to architects, engineers, builders, construction enterprises, and private individuals. During 1981, Respondent's gross revenues from performance of services directly to customers outside Illinois amounted to \$20,000. I find that Respondent is engaged in commerce within the meaning of the Act. *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224 (1963).

The Board asserts jurisdiction over all nonretail enterprises (such as Respondent's operation) which have an indirect outflow across state lines of at least \$50,000 annually. For the purposes of applying this standard, indirect outflow refers to sales of services directly to users outside the State (here, \$20,000 in 1981), and also to sales of services to users meeting any (with exceptions not material here) of the Board's jurisdictional standards. The latter class of users includes enterprises or organizations which are themselves exempted from the Board's jurisdiction, if their operations are of a magnitude which would justify assertion of jurisdiction were they nonexempt. *Siemens Mailing Service*, 122 NLRB 81, 85 (1958). During 1981, Respondent received more than \$9000 for the performance of services to St. Elizabeth's Hospital, which during that year had gross receipts exceeding \$34 million and received more than \$7 million from the federally funded Medicare program. The Board has held that it has statutory jurisdiction over hospitals which (like St. Elizabeth's Hospital) derive income from the

¹ The record as corrected by my order of February 22, 1982, shows that R. Exh. 7 was never offered and that R. Exh. 16 was received without objection.

federally supported Medicare program; and that the Board will assert jurisdiction over a hospital whose gross revenues exceed \$250,000 annually. *East Oakland Health Alliance*, 218 NLRB 1270 (1975). Accordingly, I find that Respondent's \$9000 worth of sales to St. Elizabeth's Hospital in 1981 constituted "indirect outflow" within the meaning of the Board's jurisdictional standards. During that same year, Respondent received more than \$43,000 for the performance of services to the U.S. Department of Agriculture. In connection with such services, I take judicial notice of the Act of Congress establishing that Department, "the general design and duties of which shall be to acquire and to diffuse among the people of the United States useful information on subjects connected with agricultural and rural development, in the most general and comprehensive sense of those terms, and to procure, propagate, and distribute among the people new and valuable seeds and plants." 7 U.S.C. Sec. 2201. Further, I take judicial notice of the Act of Congress appropriating about \$21 billion to that Department for the fiscal year ending in October 1982. P.L. 103, 95 Stat. 1457; House Conference Report, H. R. 97-313, p. 24 (1981). I conclude that the Department's operations are of a magnitude which would justify the Board's assertion of jurisdiction over the Department's operations were it nonexempt. *Siemons Mailing*, supra, 122 NLRB at 85; *Radio Free Europe*, 262 NLRB 549 (1982). Accordingly, I find that the \$43,000 worth of services furnished by Respondent to that Department in 1981 constituted indirect outflow within the meaning of the Board's jurisdictional standards. *St. Francis Pie Shop*, 172 NLRB 89, 91 (1968); *Hoover, Inc.*, 240 NLRB 593, 594 (1979); *Castle Instant Maintenance*, 256 NLRB 130 (1981).

Thus, Respondent's indirect outflow during 1981 amounted to at least \$72,000. Accordingly, Respondent's operations satisfy the Board's standards for assertion of jurisdiction.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Signing of the Union Cards; the Union's Bargaining Demand; Alleged Interference, Restraint, and Coercion*

On January 23, 1982, five persons in Respondent's employ—William Leary, Kevin McArthur, Craig Evan-koe, and alleged discriminatees Barry J. Urban and Joseph P. Petrarca—met at the union hall with union representatives Lester Doogan and Kenneth Doogan. After a discussion about having the Union represent Respondent's personnel and organize them for benefits, these five individuals signed cards authorizing the Union to represent them, and gave these cards to Kenneth Doogan. On that or the following day, such cards were also signed by two more employees—namely, alleged discriminatee Larry Pappageorge and his brother, Louis Pappageorge—at Larry's house. Larry gave them to Leary on January 25.

On January 25, at 11:30 a.m. local time, Company President Collin W. Gray (sometimes referred to in the record as Bill Gray) received via Western Union a telephoned mailgram from union representative Lester

Doogan. The mailgram asserted that union authorization cards had been signed by a majority of Respondent's employees in a unit consisting of "all drivers, drillers, and helpers employed by the Company excluding all other employees, office clericals, guards and supervisors as defined by" the Act. The mailgram offered to submit the employees' authorization cards to an impartial person for examination and count, and requested Respondent to recognize and bargain with the Union as the exclusive representative of the employees in that unit. This telephone message was taken down in writing by an unidentified individual in Respondent's office.

A few minutes after Respondent had received this message, President Gray approached mechanic Leary in the shop, showed him the notation which Respondent's office had prepared of the telephoned mailgram, and asked whether he knew anything about this and whether he had signed a union card. Leary said that he had. Gray asked him why. Leary said that he had gone along with the majority of the men. Gray said that if the employees joined the Union, he would have to close the business and get rid of all of them. He said that he had gone through "the thing" once, it had cost him a lot of money, and he was not going through it again.²

After receiving this telephoned mailgram, Gray telephoned the Union and asked for Lester Doogan, who was not in. A typewritten copy of the mailgram was received by Respondent at 12:34 p.m. local time that same day, January 25. About 2 p.m., Gray received a telephone call from Barry Urban, who was working in the field with Petrarca and wanted to know where they were to go next (see fn. 23 and attached text). Gray said that he had received from the Union a letter stating that it wanted to represent Respondent's personnel, that it had said he was not supposed to talk to the employees,³ but that he wanted to find out exactly what was going on, why the employees wanted to be organized. Gray said that someone had tried to organize there before, that he did not need the headaches or the aggravation, that he would not put up with it, and that if he had to go union, he would rather close his doors and subcontract the work to somebody else and keep the laboratory; he would make more money that way. He asked if Urban thought Respondent's personnel were worth union wages, and whether they could drill enough footage to make him enough money to pay union wages and benefits. Gray expressed the opinion that he did not think they were worth union wages. Gray asked Urban whether he had signed a union card and how he was going to stand on the Union. Urban said that he was going to stand with the majority and vote with the majority. Gray said that Urban and Petrarca were to come back to

² My findings in this paragraph are based on Leary's testimony. Gray denied that this conversation occurred. For demeanor reasons, I credit Leary. Gray testified that he had previously been through a representation election requested by the "International Machinists."

³ The mailgram stated, inter alia, "... any discrimination, reprisals, promises or threats directed against these employees will cause [the] Union to take such legal and economic actions as are necessary to protect the rights of these employees to join" the Union.

the shop, that Gray wanted to talk to them further about the subject.⁴

Urban and Petrarca then drove back to the shop, where they and Leary (Respondent's mechanic) began to clean up and put everything away in preparation for going home. Gray came out of his office and asked them to talk to him after their regular quitting time of 3:30 p.m. Inferentially, they said that they would. About 3:30 p.m., Gray, Urban, Petrarca, Leary, and Larry Pappageorge went into a small room which is next to and has a door into the laboratory. During the subsequent conversation, this door was open, and William J. Ellis, a unionized sewer and water contractor to whom Respondent frequently subcontracts work, was in the laboratory inspecting some written material in order to prepare a bid on a job on which Respondent was bidding. Larry Pappageorge left the room a few minutes after Gray began to talk to the employees, and did not return.

Gray said that he had received a telegram from the Union that day, and showed it to Leary, Urban, and Petrarca. Gray said that in view of the Union's "petition," some people must have signed union cards; and asked Leary, Urban, and Petrarca whether they had signed. They said that they had. Gray asked how they had tried to get organized and who had tried to organize them; they told him that Kenny Doogan had tried to organize them. Gray said that he knew he was not supposed to talk to the employees about the matter, but he wanted to find out whether the employees were going to vote for the Union. They replied that they would "just vote with the majority"; Urban credibly testified that "Nobody gave [Gray] a yes or no answer on how we were going to vote because we were afraid of losing our jobs." Gray said that he had been through union campaigns before, that he did not need to go through a union campaign again, that he had enough money to retire, and that rather than have his employees go union, he would close his doors down, sell his drill rigs, subcontract the drilling work, and operate only the laboratory. Gray further said that union companies, unlike Respondent, laid off most of their employees in the winter and when it rained. Gray also said that occasionally, if a driller and helper had finished a day's work of 120 or 130 feet, they could leave early and were paid for the whole day.⁵

Gray asked why the employees wanted a union. Leary, Urban, and Petrarca said that they would not need to be represented if they could have a little more money, somewhat better benefits, better equipment, better working conditions, spare tires, and better safety equipment and safety conditions, and if Respondent would "quit changing our time on us" (inferentially, referring to Respondent's conduct in sometimes paying its personnel for fewer hours than such persons claimed on their timesheets). Gray said that he was tired of buying tires, and asked whether the employees thought they

were "worth the money." Leary said that if Respondent paid the drillers and helpers a little more money it would probably be able to keep them longer, and expressed the opinion that the present drillers and helpers were "quality help." Leary further said that, if the employees were in the Union, their health and welfare programs would cover their families instead of, as at present, the employees only. Gray said that Respondent could not afford to give the employees a raise, and that they were not worth union wages because they did not have enough experience and were not drilling 100 feet a day. Leary said that Gray was expecting an impracticably high daily number of drilling feet. Gray said that he was an expert and his expectations were reasonable. Leary said that Gray's expectations were unreasonable because equipment kept on breaking down. Gray said that excessive equipment breakdowns would be Leary's fault because he was the mechanic. Leary withdrew his claim of excessive breakdowns. Gray said that Urban, his driller, and his logger had not been getting anything done for a 1-1/2 to 2 months. Urban said that he could get 75 feet done a day. Gray said that on a small job within 20 or 30 miles of Respondent's shop, an average driller could get 130 feet a day. Urban agreed. Gray said that a good driller could get 150 feet, and that the sites at which Urban and his crew were then working called for drilling of only 75 feet, not much more than half what an average driller could do on an average day. Urban agreed.⁶ Gray said that he was allowing plenty of travel time and overtime. Urban agreed. Gray asked why his standards of drilling footage were not being met. Urban said that the equipment kept on breaking down and the weather was bad. Gray said that the weather was "not that bad," said that the drillers in Milwaukee, Wisconsin, were getting something done, and asked what the problem was. Urban said that he did not know.

Gray said that from prior experience he knew about NLRB procedures; that in another week or so he would have to go down on a hearing to get an election date set; that there would be an NLRB election in, probably, 4 to 6 weeks; that within the next 2 or 3 weeks and upon the return of the personnel from the Milwaukee job, he would give speeches to the employees together and also independently; that he would tell the employees the pros and cons of unionization, tell them why they should vote against a union, and also answer their questions; that he had a right and a responsibility to tell the employees their and his rights if the company was union or non-union; and that he would advise them of such rights in the next few weeks, but not until all the employees in the requested unit had returned to the shop. Urban or Petrarca said that the employees should be getting union scale. Gray said that he could not afford a raise, that the employees were not "producing" and were tearing up equipment, that in consequence he had a lot of repair bills, and that the employees did not deserve a raise. Leary said that Respondent's personnel were working "extra hard" and were doing a lot of work that they

⁴ My findings in this paragraph are based on Urban's testimony. For demeanor reasons, I do not believe Gray's testimony that no such conversation took place. See also *infra* fn. 23 and attached text.

⁵ This was the first and only occasion on which Urban was ever so advised. As discussed *infra*, reaching such daily drilling footage was very rare indeed. The record discloses only one occasion on which a driller and his helper were paid for a full day for this reason.

⁶ However, as discussed *infra*, before Urban's discharge Evankoe, Respondent's best driller, averaged about 40 feet a day.

should not be doing. Gray denied this. Suggestions were made about sending both a drilling rig and a pickup truck to each job; Gray said that he could not afford this procedure.

My findings as to what was said during this conference are based on a composite of credible parts of the testimony of Urban, Leary, Gray, and Ellis. For demeanor or reasons, I do not credit Gray's denial of the shutdown threat, to which both Urban and Leary testified;⁷ or Gray's denial of their testimony that he asked certain questions about their union activity and received certain responses. I do not credit Gray's testimony at the Section 10(j) proceeding that Gray's primary reason for arranging for this discussion was Urban's and Petrarca's alleged conduct, the preceding week, in tearing the rear end out of Respondent's drill rig, in view of their lack of fault in this incident (see *infra*) and Gray's demeanor when testifying before me. Also for demeanor reasons, I do not credit Gray's denial of Urban's and Leary's credible testimony that Gray said that the employees were not worth union wages; or Gray's denial of Urban's credible testimony that Gray said he was tired of buying tires. Also, I do not credit Gray's testimony, credibly denied by Urban, that he threatened to discharge Urban and Petrarca if their work did not improve. When testifying to such a threat on January 25, Gray was obviously referring to an incident on January 28 (see *infra* fn. 24).

B. *The Refusal to Bargain*

About 10 or 11 a.m. the following day, January 26, union representative Lester Doogan returned Gray's January 25 call. Gray said that he had received the Union's telegram. Doogan asked whether Gray would bargain with the Union. Gray said that he was willing to have an election but was not going to bargain with the Union. Doogan said that he would get back to Gray, but never did.

C. *The Allegedly Discriminatory Discharges*

1. Urban and Petrarca

a. *Urban's employment history before Petrarca's rehire*

Barry J. Urban started working for Respondent on January 4, 1980, as a driller's helper. Before starting to work for Respondent, he had worked for about a month as a driller's helper for Testing Service Corporation. On March 21, 1980, Respondent's drilling supervisor, Bill Spickerman, discharged Urban because in Gray's opinion

Urban did not do his work in a timely and efficient manner, and because, in pulling a newly painted truck out of the shop, he scraped it and tore up the mirror on the passenger's side.

After Urban's March 1980 discharge, his employment included 6 months as a helper on a drill rig which was being used as a diamond core driller. On an undisclosed date before May 1981, he was laid off from this job for lack of work. On May 6, 1981, he started work for Testing Service Corporation as a soil driller. On May 26, 1981, Urban asked Gray to rehire him. Gray said that Urban had been a helper when he had worked for Respondent, and asked whether he thought he could average 100 or 120 feet a day as a soil driller. Urban said yes. Gray said that he would give Urban a chance to drill, but he would be out of a job if he did not give "100 percent," that Gray expected Urban to get at least 120 feet a day, and that he had not got much done when working for Respondent before. As discussed in greater detail *infra*, the October 1981-March 1982 drilling records which Respondent offered into evidence for Evankoe, whom Gray regarded as Respondent's best driller, show that Evankoe drilled more than 120 feet a day on a total of two occasions.⁸

Urban resumed working for Respondent on July 5, 1981. Urban testified that he was hired to work on the rig as a driller who was to bore soil holes of shallow to intermediate depth. As described in detail *infra* part II,D,3,c, he acted as a driller on some jobs and a driller's helper on other jobs. When drilling work was unavailable, he worked in Respondent's shop.

Gray testified that, until about September 1, Urban's production "was not that bad in regards to being average production." During this period, Respondent did not have much work, and Urban spent much of his time painting and sandblasting vehicles in Respondent's shop. Shop mechanic Leary credibly testified that Urban "always did a decent job for me in the shop," and that Gray had expressed some satisfaction with at least one paint job performed by Urban. On one or two occasions, Leary told Gray that Urban was better in the field than he was in the shop, and that Joseph Petrarca was a better worker in the shop than Urban.

In September 1981 Gray sent Urban to work as a helper for driller Evankoe on a job in LaCrosse, Wisconsin, which called for rockcoring, a kind of operation on which Urban had had no experience. Gray testified that Urban's work on this assignment was "okay."

Thereafter, Respondent obtained a job in Milwaukee for the Milwaukee Sanitary District. Gray testified that it was not "appropo" to put Urban on that job, because he was only an apprentice. Urban was sent up there to act as a helper to Jim Fogleman, a driller with 15 to 20 years' experience.

Fogleman acted as a driller on that job, and Urban acted as his helper, on November 17 to 20, inclusive.

⁷ In making this credibility finding, I attach no weight to Ellis' testimony that he heard no such threat. While the discussion was going on, Ellis was engaging in an activity (checking quantitative information against prints, and making numerical notations) which required at least a certain amount of concentration. Ellis testified that he did not hear Gray tell his personnel that he had heard from the Union, although Gray testified that he so stated, and his testimony in this respect was substantially corroborated by Urban and Leary. Ellis testified before me that he interpreted Gray's remark, that he had been through "this" before, as referring to an employee request for a raise. However, Gray, as well as Urban, testified that Gray made this remark in the context of references to a union campaign, and Ellis himself testified before the district court that he believed that such was the context of the reference to raises.

⁸ In view of these records, I attach virtually no weight to Evankoe's testimony that, under certain circumstances, drilling 120 feet a day is "not too unusual," or to a document posted on Respondent's bulletin board that a drilling crew is to get "a minimum of 120 to 140 feet per day as required."

During this 4-day period, they drilled a daily average of about 20 feet.⁹ The Sanitary District's field engineer (PMO representative) prepared reports showing the reasons for the drilling delays incurred by the Fogleman-Urban team on that job. More specifically, the first day they were on that job, their rig (CME 75) became stuck on soft material and was not completely set up until 5 p.m., 5 hours after they arrived on the site. The second day, several hours were lost because driller Fogleman said that he could not set up on one of the borings owing to the wet condition of the area, approval had to be obtained for an off-set boring location, a wash swivel had to be welded, a nearby fire hydrant was not charged and the harbor commissioner had to approve use of a fire hydrant on the street before mud could be mixed, and Respondent's vane shear equipment was not satisfactory. The day after that (November 19), 6-7 hours were lost because the boring kept caving in until driller Fogleman extended his casing. On November 20, time was lost because the boring caved in; and while installing a borrowed flush joint casing, Fogleman dropped into the boring a casing part which he was removing to install the flush joint.

During that same week, Evankoe worked as driller on that project with McArthur as his helper. Evankoe's timesheet for that week shows that he worked on that project on November 17-20, inclusive; I infer that McArthur did the same. The Evankoe-McArthur team did no drilling on November 17, and there is little evidence that they did any on November 18.¹⁰ They drilled 20 feet on November 19, and 14 feet on November 20.

Ten feet of drilling was done on November 21. The Sanitary District daily logs fail to show who did this work. Because Evankoe's timesheets show that he was working elsewhere on that day, and the Sanitary District logs state that Gray visited the project on that date, I accept Gray's testimony that the Fogleman-Urban team was working there on November 21. Gray testified on direct examination that, on that date, he gave Fogleman and Urban a tongue lashing because they were not getting anything done. On cross-examination, Gray testified that he also threatened to discharge both of them for poor production. Urban denied being "chewed out," or threatened with discharge, on this occasion. For demeanor reasons as to this matter I accept Gray's direct testimony only.

During the following week, Fogleman and Urban worked on this job on November 23, 24, and 25. Fogleman drilled a daily average of about 14 feet.¹¹ The field

engineer's daily log attributes loss of time to such matters as "unfreezing mud tank, water tank and fire hose to hydrant"; shutdowns to buy gasoline and supplies; draining pump and hoses; putting tools away; repairs; leak in hydraulic filter; and talking to Gray. While working on this same job during this same period, Evankoe (with McArthur as helper) drilled a daily average of 15.5 feet.¹² The field engineer's daily log contains a notation that Evankoe "made a mistake measuring rods between 92.0' and 95', washed out zone and missed two split spoon samples." It is uncontradicted that Evankoe was not warned, reprimanded, or disciplined for this incident. Gray did not testify on direct examination that during this period he threatened Urban and Fogleman with discharge for poor production. On cross-examination, Gray testified to such a threat on November 24. As to this alleged threat, I accept Urban's denial.

Urban also worked on that job from November 30 through December 5. Field activity daily logsheets signed by Fogleman state that 16.5 feet were drilled on November 30 and 12 feet on December 1. A field activity daily logsheet signed by Urban states at one point that on December 2 he and Fogleman were drillers and Steve Larson was a helper; the sheet signed by the PMO representative states that Urban was a helper. Drilling footage is specified as 4.5. The logsheet states that the driller did not wish to begin work until arrival from Chicago, about noon, of a replacement for the driller's truck, whose hydraulic system was malfunctioning. The December 3 logsheet is signed by Urban, states that he was the driller and Larson was the helper, and specifies 6 feet of drilling. Fogleman signed two logsheets for December 4. One of them does not name the driller, and specifies 12.5 feet of drilling. The other states that Urban was the driller, and gives drilling footage of 5.5. The December 5 logsheet, signed by Fogleman, does not name the driller or helper and gives drilling footage of 11.5. That week, the average daily drilling footage of the team which included Urban was about 11.4 feet. Between November 30 and December 3, the average daily drilling footage of Evankoe, with McArthur as helper, was about 11.6.¹³ Evankoe's daily timesheet shows that he worked on that job on December 4 and 5, but no logsheet with his name for those dates is in evidence. Urban testified that he began to act as driller, with Larson as helper, on the instructions of Fogleman, who said he had hurt his back. Urban was uncertain about the date that this occurred; I infer from the foregoing records that this occurred on December 2. Evankoe testified as a witness for Respondent that when Urban was drilling and Fogleman was sitting on the sidelines, Urban's production was better than Fogleman's. When Gray found out who was doing the drilling and why, he told Fogleman, "... you're the driller [Urban] has only worked on a drill rig as a driller for 8 months. We can't expect him to do these holes." I infer from the foregoing records, and from Gray's testimony that Urban was drilling 4 to 6 feet a day, that

⁹ More specifically, no feet on November 17, 47 on November 18, 11 on November 19, and 1.5 on November 20. The daily log for November 17 contains the notation, by the Sanitary District's field engineer, "Mobilization allowed as per contract." From Fogleman's signature on two daily logs for November 18, I infer that he drilled all the footage set forth in these logs.

¹⁰ As to these two dates, see *supra* fn. 9. The Sanitary District log states that CME 55 was the Evankoe-McArthur rig, and that it would be set up on November 18. Evankoe's daily timesheet states that he did an undisclosed amount of drilling on November 18.

¹¹ More specifically, he drilled 9.5 feet on November 24, 11 feet on November 25 (when he encountered a boulder or large gravel), and 21.5 feet on November 23 (actually 26.5 feet, but the field engineer disallowed 5 feet because a 5-foot rod was mistakenly added to the drill stem).

¹² More specifically, 19.5 feet on November 23, 19.5 feet on November 24, and 7.5 feet on November 25.

¹³ More specifically, 10.5 feet on November 30, 12 feet on December 1, 13.5 feet on December 2, and 10.5 feet on December 3.

Gray issued the foregoing instructions on December 4 or 5. Gray did not testify on direct examination that during this week he threatened Urban and Fogleman with discharge for poor production. On cross-examination, he testified to such a threat on December 5. As to this incident, I credit Urban's denial.

Evankoe credibly testified that on the Sanitary District job, "we were all included in getting chewed out at one time or another." Gray has variously represented that, on December 15, Fogleman was discharged, quit, or quit under pressure.

About early December 1981, Respondent obtained from ITT a job in connection with the Ambulatory Phone Service Project, referred to in the record as job 1501 (sometimes followed by a letter to denote the particular site) or the AMPS job. Respondent's initial contract required 75 feet of drilling on each of 18 sites. About December 8, Gray told Urban that a three-man crew (that is, a driller, a helper, and a logger to perform work otherwise performed by the driller or helper) would be assigned to the AMPS job because about 18 sites had to be completed in about a month. Gray further told Urban that Gray wanted one site done a day, and Urban agreed that he could do this.

So far as the record shows, Urban was the only driller assigned to AMPS jobs between December 8, 1981, and about January 25, 1982, 3 days before his discharge. He was not assigned to any AMPS jobs between December 14 and 27, during which period he worked a total of 9 days. During the 20 days he worked between December 28 and his January 28 discharge, he worked at least 9 days on the AMPS job, and perhaps as many as 13 days. After Urban's discharge, Evankoe worked on AMPS jobs from time to time until at least March 4, 1982; the record fails to show whether during this period he was working on only the 18 sites called for by the original contract, or also worked on 2 additional AMPS sites for which Respondent later obtained the contract. Evankoe finished the AMPS job on an undisclosed date before the district court hearing on May 28, 1982. On at least five occasions between December 8 and Urban's January 28 discharge, Gray told him that the AMPS job had to be done and done on time. On several occasions, Gray told Urban and Petrarca, in the presence of logger Young Chiu that "we had to get more production to get these jobs done."¹⁴ Inferentially on at least some of these occasions, Gray again asked Urban, Petrarca, and logger Chiu to start trying to get one site a day, and asked what their problems were; they explained their problems (described *infra*); and, without yelling or getting upset, Gray said, "... let's get with it, you with me, let's get on the ball."¹⁵ The record fails directly to show the dates of the conversations in Chiu's presence, which dates I infer *infra*. About early January, Gray told Urban, Petrarca, and logger Chiu that ITT had 8 sites to do in addition to the 18 called for by its contract with Respondent, but was thinking of getting another firm to do these sites because Respondent was so slow. Gray

went on to say that production was so poor that Respondent would be lucky if it finished the 18 sites it had originally contracted for. On a date undisclosed in the record, Respondent obtained a contract for two more AMPS sites. Gray told Urban from time to time to obtain authorization for overtime work, up to 11 hours a day, if he could thereby finish off a particular AMPS site and avoid the need to travel out there again; but on other occasions, Gray told him to work only 8 hours.

On December 8, 9, and 11 (Urban did not work on December 10), he worked on the AMPS job with Larry Pappageorge as the helper. Drilling footage for those dates was 150 feet for 6 hours of drilling, 36 feet for 6-1/2 hours of drilling, and 100 feet for 5-1/2 hours of drilling, respectively. I infer that Urban finished at least three AMPS sites during these 3 days. During this period, the crew did not include a logger.

The following Monday, December 14, Urban as driller and Larry Pappageorge as helper began to work on a job to be performed by Thermo-Piping Engineering at the premises of the Pacific Molasses Company. During that week, the daily drilling footage was 75 feet for 5-1/2 hours of drilling, 75 feet for 5-1/2 hours of drilling, 100 feet for 6-1/2 hours of drilling, 25 feet for 1-1/2 hours of drilling, and (with Leary as helper) 75 feet for 5-1/2 hours of drilling, respectively. On December 17, Pappageorge tried to move a drilling rig to a boring site without taking down the boom on the rig. The boom hit a low telephone line, which whipped up and hit a power line. In consequence, all the fuses in the molasses plant blew out. Urban was inside the building at the time, but he testified that this incident was partly his fault because he had let Pappageorge move the drill rig. Urban told Pappageorge that he could have electrocuted himself, and Pappageorge said that he would not leave the boom up again when he was moving the rig. Thermo-Piping told Urban that people were a little worried that someone might have got hurt. When discussing the incident with Urban, Pacific Molasses representatives did not express particular irritation. On December 17 or 18, Pacific Molasses telephoned Respondent's chief engineer, Rash Mamtara, and told him that the temperature had been about 15 degrees, the molasses was heated by electricity, and Respondent would be responsible for all the damages if the molasses froze.¹⁶ Gray credibly testified, without giving particulars, that Thermal Piping, Respondent's client, was "highly upset." That same or the next day, Gray relayed to Urban Pacific Molasses' complaints, at least; stated that Urban was causing a problem with Respondent's clients; and warned him in very strong terms that he might get killed if he was not more careful. Urban said that he would "watch it." On January 29, 1982, the day after Urban's discharge, the electric utility company billed Respondent for about \$254 in connection with the Pacific Molasses incident. By letter dated February 10, 1982, the day on which Respondent received a charge alleging that Urban and Petrarca had been unlawfully discharged, Gray's secretary, Mary Ann

¹⁴ This finding is based on the testimony of Chiu, a witness called by Respondent.

¹⁵ This finding is based on Urban's testimony.

¹⁶ This finding is based on Gray's testimony, received without objection or limitation. Because of illness in the family Mamtara did not testify before me.

Reitz, forwarded this bill to the insurance company with the following covering letter:

Per Bill Gray's instructions, I am forwarding the enclosed bill to you. Bill says we are not contesting the claim since our former employee, Barry Urban, did indeed hit the power line.

On February 13, 1982, 3 days after this letter was sent, Gray received the first amended charge, which alleged, inter alia, that Larry Pappageorge had been unlawfully discharged on February 3. It is uncontradicted that, when the power line was hit, the driver of the truck was Larry Pappageorge and not Urban. Neither Urban nor Gray testified that Urban or anyone else ever told Gray that Urban was the driver.¹⁷ There is no evidence that Gray ever spoke to Pappageorge about the incident, and no claim that this incident played any part in Pappageorge's discharge. Gray testified at the May 28, 1982 10(j) hearing that until an incident which occurred after Urban's discharge (see *infra* part II, C 2), Pappageorge "was an average employee. He hadn't done anything that I would have thought directly would have been the subject to his dismissal" other than a refusal to accept a job assignment in Milwaukee. A brief signed by Gray and submitted to the district court judge in that proceeding alleges that on December 17, 1981, Urban accidentally raised the mast of the drill rig into a 500-volt electric line, and that Urban was thereafter reprimanded for "his" negligence.

Meanwhile, between December 21 and 24, inclusive, Urban worked as a driller on the Chemical Pond job in Joliet, with Larry Pappageorge as his helper. Urban's timesheet for December 21 contains the entry, "Wait for gas man." Between December 22 and 24, he drilled a total of 185 feet.¹⁸

b. Urban's and Petrarca's work after Petrarca's rehire

During Urban's May 1981 hiring interview, Gray stated that Urban would need a helper. Urban suggested that Gray hire Joseph Petrarca, who was working with Urban at his then employer. Gray said that, since Urban was the driller and production depended a lot on the helper's assistance to the driller, Urban should have a helper who could work with him. Gray went on to say that, if Urban ever had a problem with his helper and wanted to discharge him, Gray or Mamtara would get him someone else because Urban had to have a helper who could work with him and do the job. Gray further said that, if Petrarca agreed to accept a specified hourly wage, he could go to work as Urban's helper.

Petrarca began working for Respondent about late July, inferentially as a helper, a week or two after Urban

resumed working for Respondent. Petrarca was separated in late August 1981 for reasons not shown by the record. In late December 1981, when he and Urban were roommates, Gray telephoned Urban and asked whether he thought Petrarca could run a rig. Urban said that he thought so. Gray asked whether Petrarca would come back and drill while Urban was working in Milwaukee. Inferentially, Urban relayed this message to Petrarca, who thereafter called Gray about the matter. Gray said that Petrarca could be either a helper or, at a dollar more an hour, a driller. Petrarca said that he would take the driller's job. Gray testified, without documentary corroboration, that Petrarca received a helper's pay.

Petrarca resumed working for Respondent on December 29, 1981, the day after Urban returned from a job in Milwaukee. On December 29 and 30, Urban (with Petrarca as helper and Chiu as logger) drilled about 177 feet on the AMPS job.¹⁹ Gray testified that on December 31, 1981, he orally reprimanded Urban and Petrarca for failing to accomplish enough work, warned them that they would be discharged if they did not improve, and sent them home at 1 p.m. Urban testified at the 10(j) proceeding that he and Petrarca came back early that day because they could not find out where the borings were supposed to be, and that Urban told Gray that Urban would not drill unless he knew where the gas lines were because he did not want to blow himself up. I credit Urban's testimony in this respect, which is largely corroborated by his and Petrarca's contemporaneous entries on their timesheets. Urban testified before me that he could not remember Gray's talking to him and Petrarca that day about coming back to the shop early and not getting anything done. Because Urban's and Petrarca's average daily drilling footage for that week was considerably higher than the average for Respondent's best driller, Evankoe (see *infra*), and Urban and Petrarca had returned early for safety reasons, I do not accept Gray's testimony about what he said on this occasion.

The next working day was Monday, January 4, 1982. On January 4 and 5, Urban acted as the driller and Petrarca acted as the helper, inferentially on an AMPS job. Urban's timesheet states, in his handwriting, that 60 feet were drilled on January 4 and 40 feet were drilled on January 5, and further contains the January 5 entry, "Loaded truck/ gas up got/ready to/leave." On cross-examination, Gray testified that on that day he threatened to discharge them for poor production. On direct examination, he merely testified that he told them that their production was not up to par, that they were not getting one site done a day, that the AMPS project was a high priority project, and that Respondent had to get it done. Still according to Gray's direct examination, Urban replied that his production rate had been low but he was going to get the holes drilled. I credit Urban's testimony that Gray merely gave him some "static," for demeanor reasons, because Urban had completed an average of one site a day during his only previous days of

¹⁷ Urban's testimony at the 10(j) proceeding suggests that he was the driver. However, at the hearing before me, Gray stated that Larry Pappageorge hit the power line but Urban "was remiss because he was the driller and he should have been either directing him or told him to put the tower down."

¹⁸ His daily timesheet for that week contains an undated entry, in an unidentified hand which resembles Gray's, "Bill [Gray] told Urban he is on thin ice since he hit the power line at Pacific Molasses." No like entry appears on Larry's January 25-29 timesheet, the only one in evidence for a period after the Pacific Molasses incident.

¹⁹ This finding is based on the daily timesheet filled out by Urban. Because he was apparently confused about dates, his weekly drilling summary is exceedingly confusing. This summary suggests that he may have drilled as much as 294 feet during the week ending December 31.

work on the AMPS job, because Urban's and Petrarca's drilling footage had been above average during the preceding week, and because, on the following day, Gray made Petrarca a driller (see *infra*).

On January 6 and 7, Urban worked in Wisconsin; his daily timesheet, which is not very legible, indicates that he was attempting to procure some equipment. On the morning of January 6, Gray told Petrarca that Gray could make him a driller if he could drill 100 linear feet a day. Petrarca said that he could drill that much. Gray then gave him a rig and sent him out to a job. Petrarca's daily timesheet contains the January 6 entry "Drilled 75'-Rome Villa," and the January 7 entry "Drilled Joliet 30' had trouble with rig."

Because of cold weather, Urban and Petrarca did not work on January 11. On January 12 through 14, 1982, Urban and Petrarca worked on the AMPS job.²⁰ The drilling footage totaled 95 feet for January 12 and 13. The record fails to show the footage for January 14; a notation of 75 feet is scratched out with the entry "wrong." Gray testified that, on January 14, he asked employee Chiu, who sometimes acted as logger on the jobs being performed by Urban and Petrarca, why Urban and Petrarca were not getting anything done, and that Chiu replied that they were idling away most of their time. Chiu was called by Respondent as a witness, but did not corroborate Gray's testimony as to this remark and did not testify that Urban and Petrarca in fact engaged in such conduct.²¹ Accordingly, and for demeanor reasons, I do not credit Gray's testimony in this respect. Gray went on to testify that then, in Chiu's presence, Gray told Urban and Petrarca that they would be fired if they did not get more work done. Chiu corroborated Gray's testimony in this respect. Because Urban's and Petrarca's average daily drilling footage had not been significantly inferior to that of Evankoe, Respondent's best driller, I reject Gray's testimony, and infer that this was one of the occasions when Gray said they all should "get on the ball." Urban and Petrarca did not work on January 15, for reasons not shown by the record.

On January 18, 1982, Urban worked as a driller on the AMPS job, with Petrarca as helper. In 5 hours of drilling, 75 feet were drilled; the daily drilling summary prepared by Urban states, "1-1/2 hour to charge battery get gas, etc." At this point, after Urban had spent 11 to 13 days on the AMPS job, about 8 AMPS sites had been completed and about 10 still had to be done. On the following day, January 19, Urban worked as driller on job 1507, with McArthur as helper. In 5 hours of drilling, 6 feet were drilled; the daily drilling summary prepared by Urban states that they augered 9 holes to check the depth of the sludge. On January 20, Urban worked as a driller and McArthur as a helper on a job not shown by the record. In 6 hours of drilling, 22 feet were drilled.

²⁰ Urban's daily drilling summary states that Petrarca was the driller on January 13. Petrarca's timesheet suggests that Urban was the driller on all 3 days.

²¹ The business records put into evidence by Respondent show only one period (December 28-30, 1981) when Chiu acted as logger on an Urban-Petrarca job. During this period, Urban drilled at least 177 feet (see *supra* fn. 19).

Meanwhile, on January 19 and 20, Petrarca acted as driller and Larry Pappageorge as helper on a job not shown by the record. Drilling footage on January 19 is not shown by the record; drilling footage on January 20 was 75 feet.

On Thursday, January 21, Urban and Petrarca, with Amrit Rai as logger, went out to an AMPS jobsite. The daily drilling report submitted to Respondent by Urban and the timesheet submitted to Respondent by Petrarca both state that Urban was the driller and Petrarca was the helper on that job, and there is no evidence that Respondent ever believed otherwise.²² On that day, 15 lineal feet were drilled. While the truck was pulling away the rig on the completion of a 5-foot hole which completed the job at that site, there was a loud crack, and the truck stopped and would go no further. At that time, the truck was in 6 inches or less of snow.

According to Gray, he was informed, by someone whose name he did not testify to, that Urban and Petrarca had got the rig stuck in a snowbank. On the following morning, Gray asked Urban whether he and Petrarca had got anything done. Urban said, ". . . no, not too much." Gray said that their drilling footage that day had been inadequate, and asked what was the matter with the rig. Urban said that it would not move. Rai said that Urban and Petrarca got it stuck and something went click in the rear end and the truck would not move. Gray sent Urban to the Chemical Pond job in Joliet, with Larry Pappageorge as helper, and told Petrarca and mechanic Leary to go out to the AMPS jobsite where the truck had broken down.

The truck which had broken down on January 21 when Urban and Petrarca had been using it was a truck which Respondent had bought second-hand. Mechanic Leary had performed many repairs on that truck, which was in "sad shape" when purchased, but had not checked the rear end (except for the oil) or the transmission. The occasion on which it broke down was the first time that the truck had been used after Respondent acquired it. When Leary and Petrarca returned on January 22 from the jobsite where the truck had broken down on January 21, Leary told Gray that the rear end was "tore out," but that Leary did not know anything about the transmission because the truck could not be moved.

Meanwhile, Urban and Larry Pappageorge completed 2 feet of drilling at their new jobsite, an amount which Urban testimonially described as "terrible." That day, Urban spent about 2 hours drilling through ice to reach the place from which they were supposed to take the sample. During this period, the temperature had been steadily dropping. At least partly because of the cold weather, Urban and Larry Pappageorge were unsuccessful in two attempts to remove a sample from the split spoon. Urban then telephoned Gray, who told them to quit work because of the cold weather. They worked 5 hours that day. Gray testified that, on that day, he told Urban that he would be discharged if his production did

²² For purposes of this case, it makes no difference which one was in fact the driller on that job. However, in view of these entries and Rai's corroborating testimony, I find Urban was the driller, and discredit his testimony otherwise. Cf. *supra* fn. 20.

not improve. Gray denied that he made any such statement to Larry Pappageorge, and testified, in connection with explaining Petrarca's subsequent discharge, that Gray regards the helper as partly answerable for drilling footage. Accordingly, as to Gray's remarks on this occasion, I find that this was another occasion when, upon receiving an explanation of the problem encountered on this day, Gray said, "... let's get on the ball."

On Monday, January 25, Urban and Petrarca drove a truck out to the jobsite where the truck had broken down on January 21 when they were working there. Upon reaching the site, they transferred the tools from the broken-down truck to the operative truck, and then drove out to another jobsite. However, they found that they were unable to perform any work at the new jobsite because there was too much snow there for the company truck they were driving.²³ As previously noted, when Urban called in for another assignment, Gray interrogated him about the Union, and told him and Petrarca to return to the shop, that Gray wanted to talk to them further about the Union. As previously noted, later that day Gray interrogated and threatened Urban and Petrarca about the Union, learned that both had signed union cards, and said that the employees did not deserve a raise, but did not tell them that their jobs were in jeopardy if their work did not improve.

On January 26, with Urban as driller and Petrarca as helper on an AMPS site, 2 hours of drilling and 35 linear feet of drilling were performed, with 4-1/2 hours of travel time. That day, the drill rig started leaking hydraulic fluid, the drill would not go up or down, and Urban had no tools with him to repair it. On the following day, Urban and Leary went out to the jobsite with some tools and some hydraulic fluid. On that day, they finished up that jobsite; Urban performed 40 linear feet of drilling in 2-1/2 hours, with 6 hours of travel time. On that day, the jacks would not raise the tower, there was water in the hydraulic lines, and a nipple broke off. That same day, Petrarca acted as helper to McArthur as driller; McArthur's daily drilling summary for that day is not in evidence. Urban's testimony suggests that Petrarca and McArthur were working on the AMPS job.

Meanwhile, on January 26, the truck which had broken down on January 21 was towed back to Respondent's shop, at a cost of \$340. The next day, January 27, Leary checked the transmission and tore apart the rear end. He reported that metal shavings in the transmission had torn up some of the gears but he could rebuild it; he later did so with parts which cost about \$177. Leary further reported that the rear end was damaged beyond repair. Gray testified that Leary said that the necessary parts to rebuild the front end would cost about \$907. Unauthenticated purported invoices attached to Gray's brief to the district court indicate that the total cost of such parts was \$609.50 or \$616.99.

²³ My findings in this paragraph up to this point are based on Urban's testimony, which is consistent with his entries in the daily drilling summary for that day that he and Petrarca had 6 hours' travel time and transferred tools from one rig to another. On the other hand, this travel-time entry is inconsistent with Gray's testimony, which I do not believe, that Urban and Petrarca worked in the shop all day on January 25.

On January 28, Gray directed Urban and Petrarca to go out to a jobsite in Lake Zurich, Illinois; obtain instrument readings to show the elevation and contour of the land; and then stake out and drill the soil borings. Urban's testimony suggests that this was part of the AMPS job. Urban and Petrarca were supposed to travel from the shop with Chiu, who was to act as logger. However, Chiu was delayed at home by a personal problem. After Urban and Petrarca had waited around for 45 minutes to an hour, Petrarca told Gray that Petrarca knew how to operate the instrument used for determining the elevation and contour of the terrain. Then, Gray told them to take a pickup truck to the jobsite without Chiu. Gray told them to try to complete the job that day; to try to complete it within 8 hours if possible; but that if overtime was necessary to complete the job that day, to telephone Mamtara at 1 or 2 p.m. for authorization.²⁴

Urban and Petrarca arrived at the jobsite after an hour and a half drive—that is, about 9:15 or 9:30 a.m. On the preceding day, Urban, Leary, and Chiu had moved the drill rig to the jobsite and had left the rig there on a Lo-Boy trailer. At that time, a sprocket on the rig had been loose, and Urban and Leary had tried to tighten it with a screwdriver, the best tool which they had with them. Upon reaching the jobsite on January 28, Urban and Petrarca unloaded the drill rig and went out into the field, which was a farm field covered with snow. Urban decided to follow the fence line toward the places where the borings were supposed to be taken. Petrarca walked ahead of the vehicle, which Urban drove, to make sure there were no ditches; but the back of the drill rig fell into a ditch which was covered with 6 inches of ice and over which the front of the rig, which is lighter than the back, had already gone. Urban's and Petrarca's difficulties were seen by the farmer who owned the farm. He came down with his tractor to pull out the rig, but after he hooked up his tractor to the rig, the tractor stuck. The farmer went to a neighboring farm and asked the neighbor to come over with his tractor. While driving the rig, Urban had started to feel sick. When the neighbor showed up with his tractor, Urban stayed in Respondent's pickup truck, and the work involved in pulling out the drill rig was performed by the farmers (both of whose tractors were used) and by Petrarca. Before being pulled out, the drill rig had been stuck 2 to 3-1/2 hours. Urban decided that by the time the drill rig had been pulled out of the ditch, at 12:30 or 12:45 p.m., it was too late to get anything done and he was not feeling well enough to do anything. He told Petrarca that they might as well go back to the shop so they would arrive by 3:30, the hour at which overtime rates began. Accordingly, they started for the shop in Respondent's pickup truck.

²⁴ My findings in this sentence are based on a composite of credible parts of Urban's and Gray's testimony. I do not credit Gray's testimony that he told them to get the job done that day no matter how long it took them, and threatened to fire them if they did not complete the job that day. Such testimony is somewhat difficult to reconcile with his testimony that he directed them to obtain Mamtara's authorization for any needed overtime.

Meanwhile, Chiu drove from his home to the jobsite in his own car.²⁵ On reaching the jobsite, Chiu saw that the drill rig had been removed from the Lo-Boy, on which the rig had been sitting when he left the jobsite the previous day. The drill rig was not stuck. Chiu did not see Urban or Petrarca. Chiu went to the farmer whose house was on the jobsite, and asked whether he had seen them. The farmer did not know them by name, but (according to Chiu) said that "one of them was in the pickup truck . . . he looked sick and after that they went away." In view of Chiu's testimony on this subject, his further testimony that when he saw the drill rig it was not stuck, and the evidence set forth infra, I do not credit his testimony that he arrived at 10 a.m., and conclude that he reached the jobsite after Petrarca and the two farmers had pulled the drill rig out of the ditch and Urban and Petrarca had started back for the shop in the pickup truck about 12:30 or 12:45 p.m.

Chiu's English is quite good, but English is not his native tongue. He credibly testified that, after his conversation with the farmer, Chiu drove to a gasoline station and telephoned Mamtora "to make sure what happened to" Urban and Petrarca. Still according to Chiu's credible testimony, he told Mamtora that Urban and Petrarca had been at the jobsite, that the farmer had said Urban or Petrarca had looked sick and they probably had gone "to the hospital or somewhere," but that Chiu was not sure because the farmer was not sure either. Mamtora replied that Urban and Mamtora had not returned to the shop. Mamtora instructed Chiu to return to the shop, during this conversation or a telephone conversation later that day.

My findings in the two preceding paragraphs are based on credible parts of Chiu's testimony. Chiu initially testified that the only time he saw the farmer that day was when he told Chiu about Urban's illness and the departure of the pickup truck; then testified that after relaying this report to Mamtora, Chiu waited "at the farmer's house" before telephoning Mamtora and receiving instructions to return to the shop; and then testified that on Chiu's alleged return to the jobsite, he waited there for almost an hour (when the temperature was 15 or 20 degrees Fahrenheit) without seeing the farmer again. Furthermore, Chiu testified on direct examination that during the alleged second Chiu-Mamtora telephone conversation, Mamtora told Chiu to come back because Chiu said Urban and Petrarca must never have got there; but testified on cross-examination that during the initial conversation Chiu told Mamtora that Urban and Petrarca had been there. Because of illness in the family, Mamtora did not testify before me.²⁶ Gray testified that, about 10 a.m., Mamtora told him that Chiu was on the telephone and had said that he could not find Urban and Petrarca. Gray went on to testify that he told Mamtora that Gray had seen Urban and Petrarca leave, that "they got to be there somewhere," that they may have stopped

for gasoline and the roads were bad, and that Mamtora should tell Chiu to stick around and wait for the other two. Gray went on to testify that, about 1 p.m., Mamtora told him that Chiu had telephoned that he had not been able to find Urban and Petrarca, and that Gray told Mamtora to tell Chiu to come back because "evidently [Urban and Petrarca] didn't get there."²⁷ Gray's testimony about these conversations was received without objection or limitation. Moreover, because Mamtora's failure to testify was due to illness in the family, I draw no inference from Respondent's failure to call him as a witness before me. However, I do not credit Gray's testimony about these conversations with Mamtora, and do not accept it as corroborating Chiu's testimony that he had two telephone conversations with Mamtora that day. Chiu testified for Respondent that he had learned from the farmer that Urban and Petrarca had been at the jobsite and then driven away, perhaps because one of them was ill, and that Chiu had so reported to Mamtora during their first (if indeed not their only) telephone conversation that day. I can perceive no reason why Mamtora would have reported to Gray (as Gray testified he did) that, according to Chiu, Urban and Petrarca had never reached the jobsite at all. For the foregoing reasons, and the other reasons previously mentioned, I find that Chiu reached the jobsite at least 2-1/2 hours after the 10 a.m. hour to which he testified, and that the interval between his arrival and his departure was much shorter than the 3 hours to which he testified. Furthermore, I do not credit his testimony that Mamtora said Urban and Petrarca must never have arrived at the jobsite, and am doubtful that Chiu and Mamtora ever had the alleged second telephone conversation during which Mamtora allegedly made this remark.²⁸

That morning, before leaving for the jobsite in the pickup truck, Urban and Petrarca had called Gray's attention to the fact that one of the rear tires on this truck was not the same size as the other three tires. Gray told them to take that truck anyway because the laboratory technicians did not know how to operate a clutch and needed vehicles with automatic transmissions. Urban and Petrarca had drawn the off-size tire to Gray's attention on earlier occasions as well, and had also told him that none of the trucks (including this one) had spare tires. Also, about 2 weeks earlier, mechanic Leary had told Gray that one of the tires on this truck was too small, continuing to use it would ruin the rear end of the truck, and this tire was also bald. While Urban and Petrarca were driving back to the shop, this undersized and bald tire blew out 20 to 30 miles from the shop and about 10 miles from the nearest gas station. Urban told Petrarca to

²⁵ In view of the probabilities of the case, I credit Gray's testimony that Chiu was telephonically instructed to do this, and discredit Chiu's testimony that he did not receive instructions to drive there in his own car until after he arrived at the office.

²⁶ He testified at the 10(j) proceeding, but was not asked about this incident.

²⁷ Initially, Gray repeatedly testified that Mamtora received this telephone call at 2 p.m. Later, Gray testified to the same 1 p.m. time given by Chiu on direct examination by Gray.

²⁸ In view of the probabilities of the case and the elliptical character of company witness Chiu's account of his conversation with the farmer, I am inclined to think that Chiu learned from the farmer, and relayed to Mamtora, what had happened to the rig before Urban and Petrarca left the jobsite. However, my ultimate conclusions do not depend on this inference. Petrarca's timesheet for that week contains the undated entry, in handwriting which resembles Petrarca's, "\$10.00 for getting farm tractor out. Cost me \$10.00."

drive on the flat tire to the nearest gas station, and then to telephone the shop to send someone out with a new tire or to pick them up.

When the truck reached the nearest gasoline station, about 2 p.m., Petrarca telephoned the shop. Gray's secretary answered the telephone, and transferred the call to Leary. Petrarca said that it was he who was making the call because Urban was in the truck feeling sick. Petrarca said that they had had a blowout at a point on the road where forest preserves were on both sides and that he and Urban had reached a gas station. Petrarca asked Leary to come to the gas station and put a tire on. Leary said that he had no spare tire, but would bring them a tire if he could locate one. Leary then reported the problem to Gray, who told him to bring Urban and Petrarca a tire so they could return to the shop. Leary jacked up a pickup truck owned by C.D. Gray Company,²⁹ and took off a wheel with a tire on it. Then, he drove to the gas station, about 10 miles from the shop, and substituted this wheel for the wheel with the flat tire.

When the pickup truck got back to the shop, Petrarca dropped Urban off at Petrarca's car, in which both of them had come to work that morning. Urban, who was still feeling sick, lay down on the back seat. Petrarca parked the truck, took out all the equipment, and went inside to put it away.

Gray asked Petrarca whether he had seen Chiu out there. Gray said that, according to Mamtara, Chiu had called twice, and that he had been waiting for Petrarca and Urban. Petrarca said that Chiu had not been there. Petrarca went on to say that he had got the rig stuck. Gray asked whether he and Urban had got anything done that day. Petrarca said no. Gray asked why he had not made a telephone report to the shop. Petrarca said that he had not thought about it. Gray told Petrarca to tell Urban to come in, and that both of them were being fired. Petrarca said that Urban did not want to come in. Gray said to tell him to come in, that Gray was not firing him by proxy, and that Gray wanted to tell Petrarca and Urban why they got fired "so the next time you work for someone you'll find out you have to work for a living."

Petrarca then went out to Urban, said that Gray had told Petrarca he and Urban were both fired, and said that Gray wanted to talk to Urban. Urban got out of the car and went back into the shop.

Gray asked Urban what he and Petrarca had got done. Urban said that they had got nothing done. Urban said that the rig had got stuck in the snow, getting it out had taken 2-1/2 or 3 hours, he had become sick, and he thought it was best to come back instead of staying out there, that Gray did not want them to work overtime. Gray asked why Urban had gone to work that day if he were sick, that he had been waiting around at the shop for about 45 minutes that morning, that Urban had sick

leave,³⁰ and that Respondent would have made some other arrangements. Urban replied that Gray had been complaining that he was tired of having people call in sick or taking time off, and that was another reason why nothing was getting done. Urban went on to say that he had come in because he was not feeling "that bad" in the morning and had thought he could make it through the day.³¹ Gray said that Urban and Petrarca were not worth union wages, and that they got nothing done and did not try to get anything done. Gray said that Urban and Petrarca were being fired for lack of work; because they did not do their work in a timely, workmanlike manner; because the daily drilling reports prepared by Urban omitted job numbers and total drilling footage; and because Urban had demonstrated that he was unable to work as a driller. Gray said nothing about the truck which Urban and Petrarca had left immobilized on the jobsite on January 21.³² Urban said that he was a good driller. Gray said that Urban's work record for the last couple of months showed that he was not a good driller, that he was an apprentice driller, but that "even if you were an apprentice driller and you did it actual a hard day's [work] for a good day's pay then you would still keep your job. I don't fire people just for the fun of firing people." Urban said that Gray was "impossible." Gray told Urban and Petrarca to turn their time sheets in to Mamtara, and to turn their keys and tools in to Leary. Urban and Petrarca then gave Leary their keys, and all their tools except for a set of Allen wrenches, and drove away. Urban's and Petrarca's timesheets state that they were paid until 3 p.m.

After they had driven away, Leary told Gray about their failure to return the Allen wrenches, which Leary had given them that morning in order to enable them to tighten the rig at their jobsite more effectively than he and Urban had been able to do on the previous day with a screwdriver. In an effort to find the wrenches, Leary and Gray went out to the pickup truck which Urban and Petrarca had used that day. In addition to the mud which might be expected from the nature of Urban's and Petrarca's job, the truck was littered with cake snacks, chocolate milk cartons, opened and unopened cans of soft drinks, and snack wrappers. Leary remarked that the truck looked like a pigsty, but further remarked that Urban and Petrarca had probably had to eat their lunch in the truck, that littering the truck was better than litter-

²⁹ However, in order to obtain sick pay, Respondent's employees were required to submit a doctor's certificate. Also, the employees were required to call in at 7 a.m. on the day they were off sick.

³¹ My findings in these two sentences are based on Urban's testimony. For demeanor reasons, I do not accept Gray's testimony that Urban replied, "I didn't think about it."

³² This finding is based on Urban's testimony. For demeanor reasons, and absent evidence that Respondent followed its practice of deducting repair costs from Urban's or Petrarca's paychecks, I do not accept Gray's testimony that he said they were being fired partly because on January 21 they had torn out the rear end of a truck in consequence of their "stupidity and negligence." Nor do I accept Gray's testimony that he reproached Urban for not having a man walk ahead of the drill rig that day. Gray's testimony that Urban replied that he "didn't think of that" is inconsistent with Urban's credible testimony that he in fact followed this procedure. Further, for demeanor reasons, I do not accept Gray's denial that he ever told any of his employees that they were not worth union wages.

²⁹ C.D. Gray Company is an excavating and earth-moving company in which Respondent's president has an interest, and which shares a building with Respondent. Although C.D. Gray Company employs no drillers, on occasion laborers alternate between the two operations and receive separate paychecks from each.

ing the farmer's field, and that Urban and Petrarca could hardly be expected to clean out the truck after being fired. Gray remarked that it looked as if they had been eating for the last couple of hours. Leary said that he would clean out the truck, and Gray said, "Okay." Thereafter, Leary telephoned Petrarca about the Allen wrenches. Petrarca had taken them home by mistake, and he later returned them. As described *infra* part II,C,2, on February 1 the sprocket which Urban and Leary had tried to tighten on January 27 with a screw-driver fell off the rig.

At the time that Urban and Petrarca were discharged, Respondent's bulletin board bore a May 1980 memorandum from Gray stating, *inter alia*, "Any individual who either negligently or due to a stupid mistake or error, either damages, destroys or breaks a piece of equipment, all labor and materials will be deducted from that individual's last check and will result in his termination and his helper's termination." Urban and Petrarca did not receive their final paychecks until the week after they were discharged. There is no evidence that Respondent ever tried to make any deduction from their paychecks because of the truck which broke down on January 21; compare Respondent's subsequent action in allegedly making such deductions from Larry Pappageorge's last check (*infra* part II,C,2).

Urban, Gray, and Ellis all testified at the 10(j) hearing, which concluded with a bench denial of the petition. The three left the courtroom simultaneously, with Gray in the middle. Urban called him an obscene name and muttered, "I'll get even with you . . . you haven't heard the last of it" or (perhaps) "me."³³

Gray testified at the May 1982 10(j) hearing that he discharged Urban and Petrarca on January 28, 1982, "Because from the time, starting November 21, 1981, their production was substandard with respect to doing their job and also they caused extensive amount of negligent damage to my drilling equipment just the week before, the 21st of January." As previously noted, Petrarca did not resume working for Respondent until December 29, 1981. Gray's brief to the district court states that he discharged Urban and Petrarca "since I was tired of day-in and day-out losing our profit on this job and causing the client to become very upset and dissatisfied." Gray's brief to me states that Urban and Petrarca were fired "due to their lack of doing their job in a timely, efficient and productive manner for an extended length of time which culminated in their [discharge] on January 28, 1982, after another full day of no productive work and by violating written company policy by neglecting due to their stupidity tearing the rear end out of a drill truck and damaging [it] on January 21, 1982." As previously found, during the discharge interview Gray did not refer to the January 21 incident.

³³ My finding that Urban made this remark is based on Ellis' and Gray's testimony. For demeanor reasons, I do not credit Urban's testimony that his remarks were addressed to Ellis, and consisted of an inquiry about why Ellis was testifying for Gray after Gray had "cheated" him out of a few jobs on which Ellis had spent hours working out the contracts and bidding the jobs.

c. Comparisons between Evankoe's drilling and Urban's and Petrarca's drilling

Gray testified, in effect, that Respondent's best driller was Evankoe. At the time of the July 1982 hearing, Evankoe had 5-1/2 years' experience as a driller, the last year as a driller for Respondent. Between October 5, 1981, and the discharge of Urban and Petrarca on January 28, 1982, Evankoe drilled a total of about 25 days. Respondent put in virtually no evidence as to the number of hours which Evankoe devoted to drilling during any of these days; and, as to 10 of these days, Respondent put in no evidence whatever about drilling footage. As to the 15 days where drilling footage is shown, Evankoe's daily average was about 40 feet (see R. Exh. 6 and 16). I infer that his average for the full 25 days was lower than 40 feet, because it seems unlikely that Respondent excluded Evankoe's more productive records. Between Urban's discharge and March 15, 1982, Evankoe drilled a total of about 19 days. During the last five of these days, he drilled between 2 and 6 hours a day; the record otherwise fails to show the number of hours he devoted to drilling. His average daily footage during this period was about 66 for each day of drilling. His average for each day of drilling where Respondent provided records of his drilling footage was about 55. Between November 23, 1981, and Urban's discharge on January 28, 1982, Urban drilled a total of about 31 days, for periods ranging from one half to 6-1/2 hours. His average footage for the days that he drilled was about 46.³⁴ At the time of Urban's discharge, he had about 9 months' experience as a soil driller; including 2 months with another employer, about 5 weeks' experience with Respondent as a helper, and a period of 7 or 8 weeks when his work for Respondent was mostly in the shop.

While working on the Milwaukee Sanitary District job in late November and early December 1981, Evankoe lost time because a seal had to be replaced on the water pump, because of various hole cave-ins, to haul gasoline, because of a problem with lost water circulation, and because he was 2 hours late one Thursday morning. On an undisclosed date in 1982, he lost 2 hours' work because the bolts on a slip clutch had sheared. On February 9, 1982, a truck engine blew out while Evankoe was on the way to a job. On various dates between early February and early March 1982, he lost a whole day's production because a drive shaft on a truck went out, and lost time because of a broken wheel, because of low pressure in the steam line, and because an auger broke and Respondent's shop brought the wrong size replacement. He may also have lost time on other occasions because of equipment problems. He was never reprimanded, warned, or disciplined for losing time because of equipment problems. Evankoe credibly testified to the opinion that "as far as my contact working with [Urban], I would say he did" have the fair amount of mechanical aptitude which an experienced driller must have to be able to fix minor defects.

³⁴ These figures do not include Urban's work on the Milwaukee Sanitary District project, where Fogleman was supposed to be the driller but Urban did drill for several days.

Every driller and helper in Respondent's employ is supposed to fill out a "daily time and labor distribution" sheet every week. This form contains five columns. Each column is supposed to show the day of the week; the month, day of the month, and year; the starting and quitting time for each day; whether the individual took a lunch break, and the length of any lunch break taken; how much time, if any, was spent working on Respondent's premises; the length of time, if any, spent on a job-site;³⁵ and the job number or job location. Also, in January 1980, Gray issued written instructions requiring every driller to fill out a "daily drilling summary" form every day. This form, which contains one blank for the date, calls for the rig number; the driller; the number and names of helpers; the job number; the client; the respective lineal feet drilled in connection with the split spoon, the Shelby tube, the auger, and the rock core; travel time; drilling time; and "other (explain fully all down time)." Following each of these items are five columns.

Respondent offered in evidence Urban's daily timesheets between November 23, 1981, and January 28, 1982; Evankoe's daily timesheets between September 21, 1981, and March 19, 1982;³⁶ Petrarca's daily timesheets for periods between July 1, 1981, and January 28, 1982, when he was employed by Respondent or C.D. Gray (see *supra* fn. 29); two daily timesheets filled out by Larry Pappageorge; and two daily time sheets filled out by Louis Pappageorge. None of these timesheets contains all of the information which they are supposed to include. Petrarca's and Louis Pappageorge's timesheets do not specify the job numbers, and (except for a few days on Petrarca's timesheets) they do not give the job location either. Neither the job numbers nor the job locations are given in Urban's daily timesheets for the week beginning on December 14, 1981, and January 4, 12, and 18, 1982. The record indicates that, notwithstanding Gray's written instructions in January 1980, while Urban was working for Respondent the drillers were expected to turn in a "daily drilling summary" just once a week. Respondent offered into evidence seven daily drilling summaries filled in by Evankoe (a driller throughout his employment) during a period covered by 18 of his weekly timesheets in evidence for weeks in which he performed some drilling,³⁷ and daily drilling summaries prepared by

Urban for 6 of his 9 drilling weeks between November 30, 1981, and January 28, 1982. Of the seven daily drilling summaries which were prepared by Evankoe and which Respondent thus chose to introduce, two fail to identify the client, five fail to completely set forth the distribution of hours worked, and three fail wholly or partly to identify the job number or location. Of these summaries prepared by Urban, none identifies the client, four fail wholly or partly to specify the job number or location, one contains no entries as to hours worked, one is confused as to dates, and one contains an entry, in an unidentified hand, that a drilling footage notation is wrong. Respondent failed to explain its failure to offer into evidence Evankoe's daily drilling summaries (if any) for 11 of the drilling weeks covered by his daily timesheets. There is no evidence that Respondent ever mentioned to Urban, before his discharge interview, any deficiencies in his daily timesheets or his daily drilling summaries. Evankoe testified that, on occasion, he himself was late in turning in the daily drilling summaries; and that when acting as drillers, Fogleman and McArthur sometimes failed to turn in such summaries at all; Evankoe's testimony as to Fogleman was corroborated by Gray. Gray credibly testified that "a couple of times," Urban was late turning in his daily drilling summaries.³⁸

Evankoe worked on the AMPS job, with McArthur as his helper, on February 3, 5, 8, 9, and 11, and on March 2, 3, and 4. On February 9, his truck broke down en route to the job, and he performed no drilling. Respondent put in no evidence of how many hours he spent drilling on any other February or March dates. His drilling records indicate that five sites took him 1 day of drilling each,³⁹ and that he spent 1 day on each of two jobsites without completing them.⁴⁰ His average daily drilling footage on AMPS sites was about 68 feet. Urban's average daily AMPS footage was about 63 feet. The record shows that McArthur performed the drilling on at least two, and perhaps as many as six, sites.⁴¹ McArthur's timesheets and weekly drilling summaries are not in evidence. The record fails to show how long he took as driller to complete any AMPS jobsite.

2. The allegedly unlawful discharge of Larry Pappageorge

Larry Pappageorge was hired by Respondent on September 7, 1981.⁴² He worked as a driller's helper, and

³⁵ Travel time is to be included in this figure, but need not be specified separately.

³⁶ An Evankoe timesheet with the beginning date "Monday 10-2" is probably for the workweek beginning Monday, November 2, 1981, and ending Friday, November 6, 1981. Another Evankoe timesheet with the beginning date "Monday 10-5" covers the workweek beginning on Monday, October 5, 1981.

³⁷ The seven daily drilling summaries include five documents prepared by Evankoe for the weeks beginning February 1, 8, 15, and 22, 1982, and March 2, 1982, which are not on the daily drilling summaries form but appear to be intended to serve as such summaries. In comparing the number of daily drilling summaries in evidence with the number of weekly timesheets, I have disregarded the periods between November 16 and December 4, 1981, and between January 11 and 15, 1982, during which Evankoe was working on the Milwaukee Water Pollution Abatement job. While he was on this job, Respondent may well have accepted as his daily drilling summaries certain reports which the Authority required him to prepare.

³⁸ Urban's daily drilling summary for January 12-14 is dated January 20.

³⁹ This figure includes the Evanston job, where on the first day he could perform no drilling because his truck broke down en route to the job.

⁴⁰ On February 5, his pickup truck got stuck on the Griffin, Indiana jobsite after he had drilled 51 feet. On February 8, apparently because of "no water return due to bad seal in fractured rock," he drilled only 33 feet on a Chicago jobsite.

⁴¹ As previously noted, the original contract called for 18 sites, and a second contract called for 2 more. Before Urban's January 28 discharge, nine sites were completed, all by him. Evankoe thereafter completed five sites and drilled on two more without (so far as the record shows) completing them. Urban testified without contradiction that, beginning about January 25, Respondent began to assign McArthur to act as driller on AMPS sites.

⁴² Gray asked Pappageorge to come to work for Respondent after being laid off by C.D. Gray, Inc. (see *supra* fn. 29).

occasionally worked in Respondent's shop. As previously noted, he signed a union card at his home about January 23, 1982, and gave the card to mechanic Leary on January 25.

On Friday, January 29, Gray assigned Larry Pappageorge a truck to take home that night, and instructed him to leave his Crestwood, Illinois home at 5 a.m. the following morning to drive to Milwaukee, Wisconsin, and work with a crew who was already there on a job-site. After the job had been completed, Larry Pappageorge and his brother, employee Louis Pappageorge, drove back to Chicago in the company truck assigned to Larry that morning. According to Larry Pappageorge, they reached the Chicago area about 7 p.m. but he did not start to drive his brother home until 11 p.m., by which hour Respondent's shop was locked up and the truck could not be returned. It was snowing, and Larry Pappageorge made a wrong turn on a street. He attempted to pull into a private driveway to turn around. However, he was unable to see the edge of the driveway, which was covered with snow. He missed the driveway by a tire length, and got stuck in a foot-deep culvert which ran parallel to the street and under the driveway. He could not get the truck out because of poor traction created by the ice and snow. The occupant of the house served by the driveway called the police to clear the driveway. Owing to ice on the road, the police were unable to help the Pappageorges get the truck out. The police called Walsh's Towing Company, which towed the truck to the auto pound. Larry Pappageorge tried to get in touch with the pound on the following day, January 31, but it was Sunday and the pound was closed. Later that weekend, the Pappageorges both tried to get in touch with Gray by telephone about the truck, but received no answer.

On the following Monday, February 1, Larry Pappageorge came to the shop at 7 a.m. as usual, explained to Gray what had happened to the truck, and accurately stated that the truck was not damaged (see *infra*). Larry also described his unsuccessful efforts to get in touch with the auto pound on Sunday. Gray asked why he had not bailed the truck out the night that it was impounded. Larry Pappageorge replied that because he had no driver's license, he was afraid of arguing with the police. Gray said that he would arrange to get the truck out of the pound. Larry Pappageorge said that he would pay the impoundment fees, amounting to \$5 or \$6 a day, and the towing fees, because the impounding was due to Larry Pappageorge's "boo-boo." Gray told him not to worry about it right now. Gray asked him what time he had got home the night the truck got stuck. He said 11 p.m. Gray asked why he had got home that late. He said that the Pappageorges had been working late in Milwaukee. Gray said that he did not believe that. Larry said that Gray could check the following week when he received the other employees' timesheets. The timesheet filled out by Larry Pappageorge for January 30 alleged that he had worked from 5 a.m. (his hour of departure from his home) to 7 p.m. on that day, with a half-hour off for lunch, a total of 13-1/2 hours. His timesheet in this respect is inconsistent with the January 30 timesheets

of Louis Pappageorge and Evankoe; each of the three was paid for only 8 hours' work that day.⁴³

Gray directed his secretary (Mary Ann Reitz) and laboratory head Gopi Kumar to retrieve the impounded truck, which Kumar drove back to the shop. Gray told Larry Pappageorge, McArthur, and Chiu to move a drilling rig from Lake Zurich, Illinois, to Downers Grove, Illinois, about 30 miles away. This rig had developed a loose sprocket, which Leary and Urban had tried to tighten with a screwdriver on January 27 and which Urban and Petrarca had been supposed to tighten on January 28 with a set of Allen wrenches borrowed from Lenry. While the rig was being moved by Lo-Boy on February 1, the sprocket bounced off the rig and was lost. In consequence, when the three reached Downers Grove, they could not do any work.

On the following day, February 2, Larry Pappageorge, McArthur, and Chiu drove out to a job in Joliet.⁴⁴ While McArthur was drilling, the earth started to cave in. The drill hit a rock which was caving in with the hole and, in consequence, a pin which held the gear in place to turn the drilling shaft was sheared. At that point, the gear gave out and the auger would not turn any more. The customer told Respondent's employees that they needed a particular size of casing to keep the hole open, said that Gray had undertaken to have such casing on the jobsite, and asked where it was. There was no such casing either at the jobsite or at the shop. When asked for instructions by telephone, Gray told the employees to pack up their equipment and come back to the shop.

At 2:30 a.m. on Wednesday, February 3, a subzero night, employee Louis Pappageorge telephoned Gray that Louis was looking for his girl friend's house; had lost the keys to Respondent's truck; and, therefore, could not drive it. Louis asked Gray to bring him the keys. Gray said that he did not have the keys, that he was not going to ask the mechanic to go over to the shop at that hour to see if there was another set of keys, that Louis was going to have to find somewhere to stay until 7 a.m., and that at 7 a.m. he was to call and Gray would figure out some way to get back. Further, Gray reprimanded him for using the truck on personal business after hours, and told him that he was not going to have a job.⁴⁵

⁴³ The timesheets filled out by Louis Pappageorge and Evankoe both give a 4 p.m. quitting hour. As previously noted, the Pappageorges drove away from the job together; under Respondent's policy as interpreted by Gray, Larry was not entitled to pay for travel time to Milwaukee, and neither of them was entitled to pay for travel time back to the shop. Errands which Larry allegedly at least tried to run on Respondent's behalf in the afternoon of January 30 were all performed in the Milwaukee area before the Pappageorges' 7 p.m. return to Chicago; and, in any event, Larry testified to the recollection that, while running these errands, he was accompanied by his brother.

⁴⁴ Larry Pappageorge appeared to have a somewhat better recollection of the incident than did Chiu. Accordingly, I credit Larry's testimony that he drove a company vehicle to the jobsite, and discredit Chiu's testimony otherwise. However, there is no evidence that Gray knew that Larry had driven a company vehicle that day.

⁴⁵ The amended charge claimed that Louis Pappageorge's discharge was unlawful, but the complaint does not so allege. Gray stated on the record that there was no relationship between the reasons for the Pappageorges' respective discharge.

It transpired that Respondent did not have an extra set of keys for the truck being driven by Louis Pappageorge. Louis did telephone the shop at 7 a.m. on February 3 to advise Respondent where he was.

About this same time, Larry Pappageorge reported to the shop for work. Gray told him that he could not work that day because only two people were in the shop. Gray instructed Larry to drive Larry's own car to get Louis, to get the truck the best way Larry could, and to get in touch with Gray later on that afternoon to find out what would happen on February 4. Gray said nothing about the January 30 incident involving the truck. By the time Larry Pappageorge reached the place where the truck driven by Louis had been immobilized, Louis had got the truck started and was on his way back to the shop.⁴⁶ Larry Pappageorge did not fill out a timesheet for February 3, and was not paid for any time that day.

Pursuant to Gray's instructions, Larry Pappageorge tried to telephone Gray that afternoon to find out what to do on February 4, but was unable to reach him. At 6:45 a.m. on February 4, Larry Pappageorge telephoned Gray at the shop. According to Larry Pappageorge's credible testimony, Gray told him that he was being discharged because Gray was "tired of us [losing] pieces out of the truck, [he was] tired of us breaking pieces of truck . . . [Larry's] brother lost the keys for a truck [Larry] put a truck in the ditch and [Larry] did not have a valid driver's license." Gray said nothing about any damage to the grill of the stuck truck or any damage to any other company property. Larry Pappageorge had told Gray on the first day Larry went to work for Respondent that he had no driver's license, and that he could not get one without a letter from his employer that he needed such a license in order to keep his job. Gray had said that, when his secretary got a chance, she would write up the letter and Larry Pappageorge would be able to pick it up from the office. On several later occasions, the last of which was about early January 1982, he directed a similar request to Gray and received a similar response. However, Larry Pappageorge never received such a letter.

On February 12, Larry Pappageorge came down to the shop to get his last paycheck. He asked Gray about a \$50 deduction from Larry's paycheck. Gray attributed the deduction to damage to the truck,⁴⁷ and said he was willing to show the allegedly damaged truck to Larry. Larry said that he had not damaged the truck and did not want to look at it. Gray said that he was not going to deduct the entire cost of the repairs because he knew that Larry needed money. Larry said, ". . . you give it to me or I'm going to punch you out." Larry then took several swings at Gray, who swung back at Larry but

missed.⁴⁸ After hitting Gray once, Larry left. The blow inflicted on Gray's lip a cut which required six stitches.⁴⁹ The General Counsel does not seek reinstatement for Larry Pappageorge. Larry credibly testified that Gray never asked him about his union sympathies, or mentioned anything about the Union to him.

Leary credibly testified that, on February 3 or 4, Gray told him that one reason for Larry Pappageorge's discharge was that he had done \$300 to \$400 worth of damage to a Chevrolet truck, and that Leary thereupon expressed doubt that repairing the Chevrolet would cost that much. Gray testified that the truck driven by Larry Pappageorge on January 30, 1982, was a 1973 GMC.⁵⁰ About May 12, 1982, Gray pointed out to mechanic Leary damage which at least by that time appeared on the GMC truck, and asked him to obtain a repair estimate on this GMC truck from Community Motors, Inc.⁵¹ Up to this point, Leary had never noticed that anything was the matter with the GMC's grill, and thought that the truck which Larry Pappageorge allegedly damaged was a Chevrolet. On May 19, 1982, 9 days before 10(j) hearing, Respondent obtained a written estimate from Community Motors that certain repairs on the GMC truck would cost about \$350.⁵² Inferentially thereafter, Respondent's own shop personnel straightened the GMC's hood and bumper, and repainted the GMC. At the time of the July 1982 hearing, the GMC truck still needed a new plastic grill, a new headlight ring, and a strip of chrome across the front. Leary credibly testified that these repairs would be only cosmetic, and that Respondent had in active use some trucks which were in a worse state of disrepair than the GMC. With the inferential exception of the period when the bumper and hood were being straightened and the truck was being repainted, the GMC truck was in active service at all times between Larry Pappageorge's discharge in early February 1982 and the hearing in mid-July 1982.

My findings under this heading, part II.C.2, are based on documentary evidence and on a composite of credible parts of the testimony of Larry Pappageorge, Gray, Larry, and Chiu. I do not credit Gray's testimony that he did not find out until February 1, 1982, about Larry

⁴⁶ Gray was 40 years old. Larry appeared to be in his early 20's, and in better physical condition than Gray.

⁴⁹ My findings in these three sentences are based on a composite of credible parts of Larry's and Gray's testimony.

⁵⁰ For unexplained reasons, no such vehicle is specified on a list of Respondent's vehicles drawn up by Leary to enable Respondent to reattach the proper license plates when they were removed in connection with repairing the vehicles.

⁵¹ I do not credit Gray's testimony that on February 2 he made a telephone request to Community Motors for an estimate, which was \$300 to \$400, for repairs to the GMC truck. Leary's credible testimony that the subject of this conversation was a Chevrolet truck is indirectly corroborated by Gray's testimony that the telephoned estimate did not include bumpers because Leary had already repaired the back bumper and the front bumper had not been dented. (However, Gray testified at one point that the GMC's "bumpers" had been damaged.) Leary had already repaired the back bumper of the Chevrolet; and Community Motors' subsequent written estimate for repairing the GMC truck included replacing the front bumper.

⁵² The estimate included replacing the front bumper, straightening and painting the hood, replacing the grill and upper and lower moldings, and, perhaps, straightening both right-hand turn signals (BRHTS).

⁴⁶ My findings in this paragraph up to this point are based almost entirely on Larry Pappageorge's testimony. For the reasons stated *infra*, I do not credit Gray's version of these events except to the extent that it is corroborated by Larry.

⁴⁷ Larry's timesheet for January 25-29, 1982, the most recent in the record, contains the following entry in what appears to be handwriting other than his.

62.00—Bail out truck
26.00—Overdue [illegible]
less \$87.00

Pappageorge's lack of a driver's license; Gray's related testimony that on that date he instructed McArthur not to let Larry drive a rig any more; or Gray's additional related testimony that, when firing Larry, Gray told him that Respondent would not have hired him if Gray had known Larry had no driver's license. Larry Pappageorge's testimony that Gray had long known about Larry's lack of a driver's license is corroborated not only by Urban, but also by Respondent's witness Chiu. Moreover, Gray admitted telling Larry to use his own car to pick up Louis at a time when Gray admittedly knew that Larry had no driver's license. Similarly, Chiu testified that he saw Larry drive a vehicle for Respondent after Chiu heard Gray say that he did not want Larry to drive a vehicle because he had no driver's license. Further, in view of the May 19 date on Community Motors' written estimate, the inconsistencies in Gray's testimony, and demeanor considerations, I do not credit Gray's testimony on cross-examination that his first request that mechanic Leary obtain a written estimate was made 3 or 4 days after Larry Pappageorge's discharge in early February, Gray's direct testimony that this first request was made in early March, or Gray's testimony that on an undisclosed date later that month Gray showed the GMC truck damage to Leary, who said that it "doesn't look too bad" and that Community Motors' alleged oral estimate seemed excessive.

Nor do I credit Gray's testimony that he discharged Larry Pappageorge during a telephone conversation early in the morning of February 3; that during the discharge conversation Gray attributed the discharge partly to Larry's alleged damage to a truck; and that Larry "volunteered" to pick up his brother. I rely on demeanor considerations; on the previously discussed evidence relating to Gray's change in his story regarding which truck Larry allegedly damaged; on Gray's testimony at one point that he "told" Larry to drive his car over to pick up his brother; and on the improbabilities in Gray's testimony that, during this conversation and after Larry was told of his discharge, he agreed to come to the shop before picking up his brother.

D. The Appropriate Unit and the Union's Alleged Majority Status

1. The unit issues

The complaint alleges as appropriate a unit consisting of "All drivers, helpers and drillers . . . excluding office clerical employees, laboratory employees, guards and supervisors as defined in the Act." Respondent contends that the unit must also include Young Chiu, Gopi Kumar, and Amrit Rai; the General Counsel contends that their exclusion is required by Section 9(b)(1) of the Act because they were professional employees within the meaning of Section 2(12). Respondent contends that, under Sections 9(a) and 14(a), Leary and its drillers must be excluded from the unit as supervisors within the meaning of Section 2(11); the General Counsel contends that all these individuals were employees within the meaning of Section 2(3).

2. Alleged professional employees

Respondent's business is providing geotechnical engineering services to architects, engineers, builders, construction enterprises, and private individuals. Chiu, Kumar, and Rai all have college degrees in soil engineering; and Chiu also has a master's degree in civil engineering. Kumar spent practically all his time working in the laboratory. Chiu and Rai spent much of their time working in the laboratory; they also wrote reports and made proposals. These individuals' laboratory work, at least, required them to use their education. Craig Evankoe, a driller, has a bachelor's degree in biology, but did not use this education in performing his work. Neither Urban (a driller and helper) nor Larry Pappageorge (a helper) has any education beyond high school.

Soil-drilling operations are performed by a driller, who operates the drill rig, and his helper, who does unskilled manual labor associated with that operation. When they work as a two-man team, the driller or the helper logs and stores the sample taken. Sometimes, in order to speed up the process, Chiu, Kumar, or Rai would accompany a driller-helper team to the jobsite and perform the logging operation, leaving the driller and helper to do the manual work. However, these laboratory workers never did manual labor on the drill rigs. Nor did they ever work (as drillers and helpers did when not otherwise busy) in Respondent's vehicle maintenance and repair shop. Chiu, Kumar, and Rai were all salaried; the drillers and helpers are hourly paid. I conclude that Chiu, Kumar, and Rai must be excluded from the unit as professional employees.

3. The mechanic and the drillers

a. Respondent's admitted supervisors

Respondent's operation is under the overall active management of President Gray, Respondent's sole stockholder. Respondent's admitted supervisors included Mamtara, who supervised the field personnel and reported directly to Gray. Respondent's staff also included Tokarski, whose title was "Engineering and Quality Control," and Spickerman, whom a March 1980 memorandum from Gray described as the "supervisor" of "drilling operations." Mamtara and Tokarski acted as project engineers, and scheduled the drillers and helpers for work. Mechanic Leary had some authority (which, however, he never exercised) with respect to overtime for employees in the shop, and to permit shop employees to leave early (but without getting paid for time not worked). Otherwise, only Gray and Mamtara could authorize overtime work, and only Gray had authority to give permission to take time off.

b. Leary

Mechanic Leary was the only person in Respondent's employ whose regular job assignment was connected with the repair and maintenance of vehicles in Respondent's shop. When not performing field work, drillers and helpers worked in the shop repairing and maintaining vehicles. Respondent contends that Leary had supervisory

authority with respect to drillers and helpers while they were working in the shop.

Leary received directions from Gray or Mamtora on which drill rigs had to be repaired. Unless particular vehicles were needed immediately, Leary decided the order in which vehicles were to be repaired. When a defective vehicle was brought into the shop, Leary would road-test it, decide what had to be repaired, and order the necessary parts.⁵³ Leary would tell Gray (who knows little about vehicle repair work) what tasks had to be performed on each vehicle and which drillers and helpers were capable of doing such tasks, and Gray would thereafter tell Leary to put such individuals on such tasks. When the drillers and helpers were working in the shop, they were told what to do by Leary or Gray. When laboratory personnel needed someone to pick up cylinders, Leary selected the person to perform this task, but tried to use McArthur because Gray had so instructed Leary. When hiring Leary, Gray said that he needed a shop supervisor.⁵⁴ About early October 1981, Gray advised drillers Evankoe, Urban, and Fogleman, in Leary's presence, that Leary was over the shop people and had the authority to discharge them if they did not do the tasks assigned them.⁵⁵

On one occasion in early December 1981, when Leary went out to a jobsite for repair purposes, he concluded that a particular helper was engaging in horseplay and damaging equipment, and telephoned Gray with a recommendation that the helper be discharged for this reason. Gray thereupon instructed Leary to obtain that employee's keys, and Leary did so. Immediately thereafter, Gray discharged the helper by telephone.

Leary was hired largely because he was an experienced truck mechanic. He spent 65 percent of his time doing mechanical work on the trucks and rigs, mostly in Respondent's repair shop but occasionally in the field when rigs broke down there, and almost all the rest of his time ordering and checking parts and equipment for the trucks and rigs. Leary acted as a driller's helper in emergencies, and sometimes loaded and unloaded trucks. He was paid an hourly wage, like the drillers and helpers, and had to obtain Gray's prior approval in order to skip lunch and leave a half-hour early. Leary had no authority to hire. He recommended the hire of two individuals, but neither of them was hired. Leary had no voice in determining which or how many drillers and helpers were assigned to do shop work on a particular day. Gray frequently discussed with Leary the merits of other personnel in Respondent's employ, but Gray also engaged in such discussions with other personnel whose employee status is unquestioned. Before any of Respondent's personnel drove a vehicle out of the shop, they were supposed to fill out a form and have Leary check it to see if

anything was wrong with the truck. However, this requirement was not in fact complied with until several months after the alleged unfair labor practices at issue here.

I conclude that Leary had authority, in Respondent's interest and in the exercise of independent judgment, to discharge, effectively to recommend the discharge of, and responsibly to direct employees. Accordingly, he will be excluded from the unit as a supervisor.

c. The drillers

Drillers are hired as such because they possess the mechanical skill necessary to handle the drill rig, know how to log, and know what is expected of the helper. Beginning helpers are basically unskilled manual laborers. Gray testified that a driller is in charge of his rig, and that a driller has the authority to discharge or effectively to recommend the discharge of his helper. Gray testified that he instituted this policy in 1971 when a driller with 30 years' experience threatened to quit if he had to work with certain helpers who were much younger than he and who he said were "no good." According to Gray, this driller "fired" two or three helpers until a new helper proved to be a willing worker. Gray further testified that, prior to the July 1982 hearing, the most recent occasions on which a helper had been fired at the driller's recommendation were about mid-1979. On the first such occasion, drilling supervisor Mamtora had been complaining to the driller about poor production; the helper would not do what the driller told him to do; the driller said that the helper could not learn how to do anything and was not doing the work which allowed the driller to get the job done, and that the driller did not want him and wanted to fire him; and Respondent did so. According to Gray, a month or two later, the same driller "fired" another helper who was a friend of the driller and had been hired at his request. Gray testified that drillers seldom sought the discharge of their helpers because Respondent tried to hire for each driller a helper with whom he could be on friendly terms. This 1979 instance aside, the only specific evidence of such efforts is the testimony regarding Respondent's initial hire of Petrarca, who was separated about a month later, to act as Urban's helper. During this July 1981-January period, Urban and McArthur sometimes acted as helpers to Evankoe; Petrarca, McArthur, and Larry Pappageorge sometimes acted as helpers to Urban; and Larry Pappageorge sometimes acted as helper to McArthur, Petrarca, and Evankoe. There is no evidence that any person acting as a driller was ever consulted about which person was to act as his helper on any particular day; and as to certain specific assignments, the record indicates that the driller was not so consulted.

Instructions permanently posted on Respondent's bulletin board state that the daily drilling progress charts, which are based on reports prepared by the driller, "will be utilized to determine whether you will receive a promotion with a pay raise or a demotion (pay cut or be fired-driller or helper)." These instructions further state that if a driller damages equipment negligently or "due to a stupid mistake or error," both the driller and his

⁵³ I need not and do not determine the extent, if any, to which he could order parts without Gray's authorization.

⁵⁴ This finding is based on Gray's testimony. Leary's testimony before me that he was never told he was a supervisor or "boss" is inconsistent with his testimony at the 10(j) proceeding that he was so told.

⁵⁵ This finding is based on Evankoe's testimony, and on Leary's testimony at certain points. In view of such testimony by Leary, I do not accept his testimony at other points that he was never told that he could fire employees, or his testimony that he did not tell anyone what to do.

helper will be terminated. Gray testified at the 10(j) proceeding that the daily drilling sheets, kept by the driller, establish the production for both the driller and the helper.

The employment history of both Evankoe and Urban shows that they learned to become drillers by working as helpers. Gray testified, in effect, that McArthur was learning to become a driller in the same way. Evankoe was receiving \$10.50 an hour at the time of the July 1982 hearing; the record fails to show his January 1982 pay rate. As of January 1982 and July 1982, McArthur was receiving \$6.50 an hour; the record otherwise fails to show the helper's pay. Urban's job application suggests that his hourly rate was \$8, but this is not very clear. Petrarca was offered and accepted a \$1 hourly differential to work as a driller rather than a helper, but in fact performed little drilling. Drillers and helpers had the same fringe benefits and out-of-town per diem.

Between Urban's July 1981 hire and his January 1982 discharge, a period which encompassed the Union's bargaining demand and Respondent's refusal to bargain, Evankoe was the only person sought to be included in the bargaining unit in late January 1982 who acted as a driller but never as a helper. Evankoe was consulted by Gray when he was preparing a bid, normally received a copy of the specifications and plans, and normally consulted with the engineers about what to figure for production. There is no evidence that Gray similarly consulted anyone else sought to be included in the unit. During this 7-month period, when drilling was being performed, Urban usually acted as a driller but sometimes acted as a helper; McArthur and Petrarca usually acted as helpers but occasionally acted as drillers; and the Pappageorges always acted as helpers.

Evankoe credibly testified that when he talked to Gray around early July 1981 about working for Respondent as a driller, Gray told him that, if a helper is no good, the driller is supposed to talk to Gray or Mamtora, and Respondent would thereupon get the driller another helper because the driller cannot do anything unless the helper cooperates. Evankoe further credibly testified that when he was hired on July 7, 1981, and on several later occasions, Gray told him that if the driller felt that the helper was not worth his time, the driller was to fire him on the spot. Evankoe had never in fact discharged anyone, testified that he probably would not do so without consulting Gray, and did not know that any driller had ever discharged anyone. Urban credibly testified that, when Gray hired him as a driller, Gray told him that if he had a problem with his helper and wanted to fire him, Urban should tell Mamtora or Gray, and Respondent would get rid of the helper and get Urban another one.

On the basis of this testimony by Evankoe and Urban, I find that both of them were supervisors within the meaning of the Act because they had the power, in Respondent's interest and in the exercise of independent judgment, to discharge or effectively to recommend the discharge or transfer of their helpers.⁵⁶ I do not agree

with the General Counsel's contention that Evankoe and Urban did not have this power because they had never exercised it during their tenure with Respondent and no driller had exercised it for 3 years. *Enclosure Corp.*, 225 NLRB 629 (1976). While Respondent apparently failed to take action upon more recent reports from unidentified drillers that their helpers were "no good," there is no evidence that any driller specifically asked for his helper's discharge or transfer. While it is true that finding Evankoe and Urban to be supervisors gives rise to an unusually high ratio of supervisors to employees, I note that drilling work is performed at sites which are some distance from Respondent's place of business (sometimes, at locations where the drillers and helpers cannot return home at night) and, on occasion, where no admitted supervisors are present.

However, there is no evidence that McArthur or Petrarca was ever advised that, when acting as driller, he had discharge powers with respect to his helper. Accordingly, I conclude that they had no such powers. *Tio Pepe, Inc.*, 237 NLRB 537 (1978). In any event, because helpers are admittedly employees, I conclude that the employee status of McArthur and Petrarca in January 1982 cannot be affected by their sporadic performance of the allegedly supervisory job of driller. *Certified Ad Services*, 239 NLRB 156, 163 (1978).

4. The Union's majority status in the appropriate unit

In short, I find that the appropriate unit consists of Respondent's drillers without power with respect to discharge, and helpers, excluding office employees, laboratory employees, the mechanic, drillers who have power with respect to discharge, guards and supervisors as defined in the Act. As of the date of the Union's bargaining demand, the employees in the unit consisted of Petrarca, McArthur, and the two Pappageorges. As of that date, all four had signed union cards whose operative effect is not challenged by Respondent.⁵⁷

E. Analysis and Conclusions

1. The allegedly unlawful threats and interrogation

My finding that Leary and Urban were supervisors calls for dismissal of the complaint allegation that Respondent, through President Gray, unlawfully threatened and interrogated Leary, during their conversation about noon on January 25, 1982, and unlawfully threatened and

complaining to their supervisors about the performance of their helpers, the operators had brought about the helpers' discharge or transfer. However, the operators in that case had no power to discharge or to specifically recommend such action.

⁵⁷ The cards stated, in part (emphasis in original):

AUTHORIZATION CARD

I . . . hereby authorize LOCAL 150, INTERNATIONAL UNION OF OPERATING ENGINEERS to be my exclusive bargaining representative for the purpose of collective bargaining with the management of [Respondent]. I understand that my signature on this card is the same as a vote for the above named union and that if enough cards are signed the above named union may become the bargaining representative without an election.

⁵⁶ Cf. *Ward-McCarty Hot Oil-Paraffin Service*, 171 NLRB 731, 732-734 (1968), where skilled operators were held to be employees although, by

interrogated Urban during the Gray-Urban telephone conversation later that day.

However, I agree with the General Counsel that Respondent violated Section 8(a)(1) of the Act on January 25 when Gray told a group which included employee Petrarca that rather than have the employees go union, Gray would close his doors, sell his drill rigs, subcontract the drilling work, and operate only the laboratory. While it is true that under certain circumstances an employer may lawfully discontinue all or part of his business because of a union's advent, he may not lawfully threaten such action as distinguished from announcing a decision to close already reached. *Textile Workers v. Darlington Co.*, 380 U.S. 263, 269-274 (1965), including fns. 20 and 16 (1965). In addition, I agree with the General Counsel that Respondent further violated Section 8(a)(1) when, during this same conversation, Gray asked whether those present had signed union cards, how they had tried to get organized, who had tried to organize them, and whether the employees were going to vote for the Union. In finding that Respondent thus engaged in unlawful interrogation, I note that Gray followed these remarks by the threats of reprisal discussed above, that he was thereby seeking information useful for discrimination, that Respondent thereafter did in fact engage in unlawful discrimination, that he gave no legitimate reasons for his inquiries, that no such legitimate reason appears, and that somewhat evasive responses were given to some such inquiries.

2. The allegedly unlawful discharges

a. Urban and Petrarca

I agree with the General Counsel that Urban and Petrarca were discharged on January 28, 1982, because of their union activity. Respondent's opposition to the Union is evidenced by Gray's repeated threats to shut down the operation if the Union came in. Moreover, Urban and Petrarca admitted, in response to Gray's January 25 questions, that they had signed union cards and intended to "vote with the majority" which majority the Union had truthfully claimed. Moreover, Gray discharged Urban and Petrarca just 3 days after learning of their union activity and receiving the Union's bargaining demand, and during the discharge interview, repeated his remark during the January 25 conversation that they were not worth union wages. Furthermore, the record shows that the lawful reasons which Respondent has tendered for the discharges are not the real ones.

Thus, when discharging Urban and Petrarca, Gray told them, among other things, that they were being discharged for lack of work. However, as discussed infra, Respondent now contends that Urban and Petrarca were discharged partly because of slow progress on the incomplete and assertedly urgent AMPS job. Gray testified before the district court that Petrarca was discharged partly because of poor production starting November 21, 1981; but Petrarca did not resume working for Respondent until December 29, 1981, more than a

month later.⁵⁸ Gray testified before the district court, and contends in his brief to me, that Urban and Petrarca were discharged partly because of the incident a week earlier when their truck broke down; but Gray did not so advise them, nor so contend in his brief to the district court. Moreover, the breakdown in question was caused by a defect in the transmission and rear end, neither of which had been checked by Leary while restoring it from its "sad shape" when purchased second-hand; Respondent had not used the truck at all before Urban and Petrarca used it that day; and there is no credible evidence that Respondent ever specifically reproached them about the truck incident. Furthermore, from time to time Urban, Petrarca, and Evankoe had all lost up to a full day's work because of blowouts and mechanical breakdowns without being reproved therefor. Respondent told Urban and Petrarca that they were being discharged because the daily drilling summaries prepared by Urban omitted job numbers and total drilling footage; but Respondent did not tender this explanation to the district court or to me, and there is no evidence that Gray had ever previously complained to Urban about the matter. Moreover, McArthur (who was retained) sometimes failed to turn in any summaries at all; Respondent's failure to produce the summaries he did turn in leads me to infer that his were at least as incomplete as the Urban summaries which Respondent chose to introduce; and the limited number of Evankoe's summaries selected by Respondent for inclusion in the record were also incomplete. Finally, although Respondent has contended at all times that Urban and Petrarca were discharged in whole or in part because they were unproductive, Respondent's records show that Urban's drilling footage was comparable to that of Evankoe, whose standard Gray admittedly did not expect Urban to meet, and that the same was true with respect to Urban's and Petrarca's drilling on the AMPS job. Moreover, Respondent's failure to bring in records of McArthur's drilling on the AMPS job leads me to infer that his work was markedly inferior to Urban's.

Furthermore, if (as Respondent contends) Urban's and Petrarca's discharge on January 28 had nothing to do with the Union's January 25 bargaining demand, Gray's selection of that particular January 28 date is difficult to explain. Gray testified at the 10(j) hearing that Urban's and Petrarca's production on that date was no different from their production a week earlier; Gray testified before me that drill rigs get stuck in the snow during the winter an average of once a month, and oftener if the snow is deep; and he further testified before me that telephoned requests from an AMPS jobsite for overtime authorization were to be made when the job was near completion (not, as here, where the drilling had not even been started 5 hours after the beginning of the workday). Moreover, if indeed Urban's and Petrarca's discharge was motivated by their poor production, an ordinarily humane employer would likely have decided to defer

⁵⁸ While the record indicates that Respondent on occasion held the helper answerable for the driller's deficiencies, it is highly unlikely that this policy extended to periods when the helper was not working for Respondent.

their discharge for at least a few days in view of the discharges' misfortunes earlier that day—a rig which required the assistance of two farmers to drag it out of the ditch; a driller who became sick while in a truck miles from the shop on a cold, snowy day; a blowout in a tire which Gray had been advised just before the truck was taken out was undersized and bald; and a wait at a gasoline station owing to the absence of a spare tire, of which Gray had also been apprised before the truck was taken out. For the foregoing reasons, I conclude that Urban's and Petrarca's union activity was the real reason for their discharge.

My finding that Urban was a supervisor requires dismissal of the complaint as to him. *Parker-Robb Chevrolet*, 262 NLRB 402 (1982). However, I conclude that employee Petrarca's discharge for union activity violated Section 8(a)(3) and (1) of the Act. While Respondent has pointed to various alleged deficiencies in his work performance, the presence of valid grounds for an employee's discharge does not legalize a dismissal which was nevertheless due to a desire to discourage union activity. *Borek Motor Sales v. NLRB*, 425 F.2d 677, 680 (7th Cir. 1970), cert. denied 400 U.S. 823 (1970); *Justak Bros. & Co. v. NLRB*, 664 F.2d 1074, 1079 (7th Cir. 1981); *Rose's Stores*, 256 NLRB 550, 552 (1981), enf'd. 681 F.2d 816 (4th Cir. 1982).

b. Larry Pappageorge

Clearly, the reasons for Larry Pappageorge's discharge were not the reasons given by Respondent. Although Respondent's brief asserts that he was discharged partly for not having a valid driver's license, credible evidence proceeding partly from Respondent's witness Chiu establishes that Gray had known throughout Larry's 5 months of employment that he had no license and, moreover, throughout this period Gray had failed to comply with Larry's repeated requests for a letter which he needed to obtain one. Gray asserted in his oral argument at the close of the hearing, and reiterated in his brief, that Larry was discharged partly because on January 30 he used Respondent's truck on personal business; but Gray did not so advise Larry when discharging him and did not testify that he was discharged partly for this reason. Although Respondent's brief asserts that Larry Pappageorge was discharged partly because he damaged the GMC truck he was driving on January 30, the credible evidence shows that it was not damaged that day; that it was in active service at all times thereafter; that Respondent initially told mechanic Leary that Larry was discharged for damage to a Chevrolet truck (which he was not driving); and that until May 19, 9 days before the 10(j) hearing, Respondent made no effort to obtain an estimate for the GMC damage for which Pappageorge was allegedly responsible on January 30. Further, although during the discharge interview Gray told Larry that he was being discharged partly because he had lost "pieces out of the truck" and because his brother Louis had lost a set of truck keys, Gray has disavowed such reasons to the district court and to me, and Larry was not at fault in either of these instances.

Further, the evidence shows that Larry was discharged 10 days after the Union's bargaining demand;

that Gray threatened to shut down the drilling operation if the employees went union; that he interrogated three other persons in Respondent's employ (Leary, Urban, and Petrarca) about whether they had signed union cards and intended to vote for the Union; and that 3 days later, Gray discharged for union activity two of these individuals who revealed their union sympathies. Also, the unit specified in the Union's January 25 bargaining demand consisted of only six or seven persons (the two Pappageorges, Evankoe, McArthur, Petrarca, Urban, and perhaps Leary); Evankoe credibly testified that he never revealed his union sympathies to Gray; Leary's assertion to Gray that Leary had signed a union card because he had gone along with the majority of the men carried at least the implied representation that cards had also been signed by at least four (that is, at least two individuals in addition to Urban and Petrarca) of the six persons besides Leary in the Union's proposed unit; and the Union's majority claim to Gray, if true, meant that a union card had been signed by at least one person in addition to the three (Petrarca, Urban, and Leary), who on January 25 had admitted signing cards.

However, Larry Pappageorge's only union activity consisted of signing a union card at his home. Gray never asked him about his union sympathies, and never mentioned the Union to him. As to Leary, Urban, and Petrarca I have discredited Gray's testimony that nobody told him until the May 1982 district court proceeding who had signed union cards. Nevertheless, I find the evidence insufficient to warrant discrediting such testimony as to Larry Pappageorge.⁵⁹ It is true that on January 25 Larry Pappageorge gave his card to mechanic Leary, whom I have found to be a supervisor. However, because Leary was himself one of those who signed union cards and were threatened with the shutdown of operations if the employees chose union representation, I do not regard it as reasonable to infer that he told Gray about Larry's union activity. Notwithstanding my strong suspicions, the complaint as to Larry Pappageorge will be dismissed.

⁵⁹ The General Counsel contends in his brief that Evankoe and McArthur were retained because they "were in Milwaukee all this time, and therefore, from Respondent's point of view, less likely to be involved in a claim of majority status [by] a union in Chicago." Gray testified at the 10(j) hearing that the "drillers" who were absent from the January 25 meeting were in Wisconsin; and he testified before me that during that meeting he said that "you've got four guys up from Milwaukee that aren't even here." Urban testified that, on January 19 or 20, Respondent left Evankoe in Milwaukee to finish the Sanitary District job, and brought back McArthur (who had been acting as Evankoe's helper) to work as a driller on the AMPS job. On January 19 and 20, McArthur acted as helper to Urban on job 1507, about a 45-minute drive from Respondent's shop. Larry Pappageorge testified that, by January 30, McArthur was again working in Milwaukee. Assuming, arguendo, that McArthur (as well as Evankoe) was working in Milwaukee on what the General Counsel believes to be the critical dates on and before January 25, I attach little weight to their work location in determining whether Gray knew or suspected that a union card had been signed by Larry Pappageorge, who on January 25 had been working in Joliet and Downers Grove, Illinois (37 miles and 10 miles from Chicago, respectively).

3. The refusal to bargain and the requested bargaining order

a. The alleged violation of Section 8(a)(5)

The unit specified in the Union's January 25 bargaining demand was Respondent's "drivers, drillers, and helpers," consisting of six or seven people. I have found this unit to be inappropriate to the extent that it included driller Evankoe and driller/helper Urban and may have included mechanic Leary.⁶⁰ Because of the substantial deviation between the appropriate unit and the unit specified in the bargaining demand, the demand was not a proper request to bargain. *Motown Record Corp.*, 197 NLRB 1255, 1261 (1972); *Chester Valley, Inc.*, 251 NLRB 1435, 1450 (1980), modified 652 F.2d 263 (2d Cir. 1981). Accordingly the 8(a)(5) complaint allegations will be dismissed.

b. The requested bargaining order

However, the absence of an 8(a)(5) finding does not preclude the issuance of a bargaining order if such an order is appropriate to remedy the 8(a)(1) and (3) violations found. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614-620 (1969); *NLRB v. Quick Shop Markets*, 416 F.2d 601, 606 (7th Cir. 1969); *Peaker Run Coal Co.*, 228 NLRB 93 (1977); *Naum Bros., Inc.*, 240 NLRB 311 (1979), enfd. 637 F.2d 589 (6th Cir. 1980); *Glengarry Contracting Industries*, 258 NLRB 1167, 1167 fn. 3, 1175-76 (1981); *Martin City Ready Mix*, 264 NLRB 450 (1982). As previously found, at all times after January 23, 1982, all the employees in the appropriate unit had signed operative authorization cards. Between January 25 and 28, Respondent engaged in unlawful conduct which had the tendency to undermine majority strength and impede the election process. Under these circumstances, a "second-category" bargaining order should issue if the possibility of erasing the effects of past practices and of ensuring a fair election by the use of "traditional" remedies is slight and employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order. Among the factors material in making such an assessment are the extensiveness of the unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. *Gissel*, supra, 395 U.S. at 614; *Justak Bros. & Co.*, 253 NLRB 1054, 1084 (1981), enfd. 664 F.2d 1074 (7th Cir. 1981); *NLRB v. Berger Transfer & Storage Co.*, 110 LRRM 2865, 2874-2875 (7th Cir. 1982).

The unfair labor practices herein included the discharge for union activity of one of the four employees in the unit, and a threat to close down the operation if the employees chose union representation. Unfair labor practices of this kind have been described as "hallmark" violations which support the issuance of a bargaining order unless some significant mitigating circumstance exists. *NLRB v. Century Moving & Storage*, 683 F.2d 1087, 1094 (7th Cir. 1982); *Martin City Ready Mix*, supra, 264 NLRB 451 at fn. 13. Discharges for union activity in-

volve conduct and complete action, and are likely to have immediate impact and continuing effect. *Century Moving*, supra, 683 F.2d at 1094. Moreover, *Gissel*, supra, approved the issuance of a bargaining order to remedy shutdown threats alone. See *Sinclair Co.*, 164 NLRB 261, 269 (1967), enfd. 397 F.2d 157 (1st Cir. 1968), affd. 395 U.S. at 587-590, 615-620 (1969). Also, the probable impact of unfair labor practices is increased when a small bargaining unit (here, four employees) is involved. *Justak*, supra, 664 F.2d at 1082; *Berger Transfer*, supra, 110 LRRM at 2875. Moreover, Collin W. Gray, who committed these unfair labor practices and engaged in coercive interrogation, is Respondent's president, sole stockholder, and principal operating officer. Nor is there any evidence that Respondent has made any effort to neutralize the effect of these unfair labor practices.

I conclude that, because of the foregoing considerations, a cease-and-desist, reinstatement-backpay, and notice-posting order would be insufficient to ensure a fair election within a reasonable time. In the first place, the nature of the Respondent's "hallmark" unfair labor practices (threats of job loss and their partial execution) persuades me that the damage to the employees' ability to exercise a free choice has already been done, even if Respondent does not resume its unfair labor practices. See *Justak*, supra, 664 F.2d at 1082, 253 NLRB 1085. Moreover, I am doubtful whether an order confined to "traditional" remedies would deter Respondent from resuming its unfair labor practices. Respondent's president, sole stockholder, and principal operating officer commenced such conduct within a few hours after the Union had included in its bargaining demand cautions against discrimination and threats. Nor was he then new to the Act; rather, he had previously experienced two union campaigns, one of which led to an NLRB election and another of which had led to "some kind of settlement on the advice of my counsel. . . . The union cancelled" the election.

In view of the foregoing, I find that the chances of holding a fair election within a reasonable period are slight and that, on balance, employee sentiment would be better protected by a bargaining order than by the mere use of "traditional" remedies. See *Justak*, supra; *Berger Transfer*, supra; *Martin City*, supra. The only even arguable "mitigation" of Respondent's "hallmark" violations is the fact that, a few days after Petrarca's discriminatory discharge, Respondent lawfully discharged two of the remaining three employees who had been in the unit when the Union sought bargaining. However, even if Petrarca declines to accept a reinstatement offer, Respondent's prior unfair labor practices will remain in the memory of the undischarged employee, and will likely be conveyed to any new employees, not only by him, but also by card signers Evankoe and Leary. Because Respondent's unfair labor practices began on January 25, 1982, after the Union achieved majority status, Respondent's bargaining obligation is found to have arisen on that date. *Peaker Run*, supra, 228 NLRB 93.

⁶⁰ Respondent did not employ drivers as such, but driving was in fact performed by both drillers and helpers.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent's drillers without power with respect to discharge, and helpers, excluding office employees, laboratory employees, the mechanic, drillers with power with respect to discharge, guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. The Union has been at all times since January 24, 1982, and still is, the bargaining representative of the employees in said unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.
5. Respondent has violated Section 8(a)(1) of the Act by threatening employee Joseph Petrarca that Respondent's operation would close down if the employees chose union representation, and by interrogating him about union activity.
6. Respondent has violated Section 8(a)(3) and (1) of the Act by discharging employee Petrarca for union activity.
7. The unfair labor practices in Conclusions of Law 5 and 6 affect commerce within the meaning of the Act.
8. Respondent has not violated the Act by threatening and interrogating William Leary and Barry Urban, by discharging Urban and Larry Pappageorge, or by refusing to bargain with the Union.

THE REMEDY

Having found that the Company has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom. Because Respondent engaged in serious unfair labor practices through its president, sole stockholder, and principal operating officer, a broad order is called for. *Hickmott Foods*, 242 NLRB 1357 (1979). Accordingly, I shall recommend that Respondent be required to cease and desist from infringing on employees' rights in any other manner.

Affirmatively, Respondent will be required to offer Joseph Petrarca immediate reinstatement to the job of which he was unlawfully deprived or, if such a job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges previously enjoyed; and to make him whole for any loss of pay he may have suffered by reason of the discrimination against him, less net interim earnings, to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as called for in *Florida Steel Corp.*, 231 NLRB 651 (1977).⁶¹ Also, Respondent will be required to remove from its files any reference to Petrarca's unlawful separation, and notify Petrarca in writing that this has been done and that evidence of his unlawful discharge will not be used as a basis for future personnel action against him. *Sterling Sugars*, 261 NLRB 472 (1982). Further, Respondent will be required to bar-

gain with the Union, on request. In addition, Respondent will be required to post appropriate notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommendation⁶²

ORDER

The Respondent, Soil Engineering & Exploration Co., Inc., Tinley Park, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Threatening to close operations if its employees choose union representation.
 - (b) Interrogating employees about union activity in a manner constituting interference, restraint, and coercion.
 - (c) Discharging or otherwise discriminating against any employee with regard to his hire or tenure of employment or any term or condition of employment, to discourage membership in International Union of Operating Engineers, Local 150, AFL-CIO, or any other labor organization.
 - (d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights under Section 7 of the Act.
2. Take the following affirmative action designed to effectuate the policies of the Act.
 - (a) Offer Joseph Petrarca immediate and full reinstatement to the position of which he was unlawfully deprived or, if that job no longer exists, to a substantially similar job, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered by reason of the discrimination against him, in the manner set forth in the part of this Decision entitled "The Remedy."
 - (b) Expunge from its files any reference to Petrarca's discharge, and notify him in writing that this has been done and that evidence of his unlawful discharge will not be used as a basis for future personnel actions against him.
 - (c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, time-

⁶² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Because Respondent has up to this point been represented only by its president, who is not a lawyer, the following special caution is added: Some of my findings unfavorable to Respondent have not affected the recommended Order against it because I have recommended that relevant portions of the complaint be dismissed on other grounds. However, it is possible that the Board (pursuant to timely exceptions or cross-exceptions by the General Counsel or the Union) may disagree with my reasons for dismissing such portions of the complaint. In that event, the Board's order against Respondent may be affected adversely to it by some of my findings which at present do it no harm. Nevertheless, a failure by Respondent to file with the Board timely exceptions or cross-exceptions to such findings may preclude Respondent from thereafter challenging them (including, but not necessarily limited to, my findings that Urban was discharged for union activity, Larry Pappageorge was not discharged for the reasons given by Respondent, and Respondent's remarks to Urban and Leary individually did not violate the Act). See *Barton Brands v. NLRB*, 529 F.2d 793, 801 (7th Cir. 1976).

⁶¹ See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

sheets, daily drilling summaries, personnel records and reports, and all other records necessary or useful for analyzing and computing the amount of backpay due under the terms of this Order.

(d) On request, recognize and bargain with the Union as the exclusive representative of the employees in the following appropriate unit, and embody in a signed agreement any agreement reached: Respondent's drillers without power with respect to discharge, and helpers, excluding office employees, laboratory employees, the mechanic, drillers with power with respect to discharge, guards and supervisors as defined in the Act.

(e) Post at its Tinley Park, Illinois facility copies of the attached notice marked "Appendix."⁸³ Copies of said notice, on forms provided by the Regional Director for Region 13, after being signed by Respondent's representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in con-

spicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the complaint is dismissed to the extent that it alleges that Respondent violated the Act by interrogating and threatening William Leary and Barry Urban, by discharging Urban and Larry Pappageorge, and by refusing to bargain with the Union.

⁸³ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."